DAY IN COURT

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DAY IN COURT:

OR

THE SUBTLE ARTS OF GREAT ADVOCATES

BY

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TO MY FRIEND

MR. JUSTICE JAMES A. O'GORMAN

THIS BOOK

IS RESPECTFULLY DEDICATED

PREFATORY NOTE

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THIS is in no sense a law book. The general reader cares little for lawyers and their dry rules of law, or the prosaic forms of practice and procedure in our courts. Everybody, however, is interested in the drama of a great trial, where the property, reputation, liberty, or life of a human being is often at stake. This has been strikingly exemplified recently by the great interest taken in the trial of Madame Steinheil in France, accounts of which were published in all the leading newspapers of the world.

The Tichborne case, the Beecher trial, the Parnell inquiry, the Dreyfus case, and countless others are still fresh in the memory as further illustrations of the intense interest taken throughout the civilized world in arriving at the truth or falsity of any important legal controversy.

All our leading newspapers, nowadays, publish detailed accounts of every occurrence of general interest long before such matters reach the stage of litigation, and the whole reading public thereby becomes a jury

to weigh each step of the evidence and render their verdict upon its truth or falsity. That this is true even of quasi-scientific questions was well illustrated by the intense public interest in the newspaper controversy as to Dr. Cook's alleged discovery of the North Pole, or his ascent of Mt. McKinley.

Comparatively few of the innumerable controversies and disputed questions of fact that are almost daily commanding the attention of the reading public ever reach the courts.

All the various organizations, clubs, and associations of every conceivable character, whether organized for purely social purposes, as social clubs, or for political, business, educational, religious, scientific, literary, or any other purpose, have their own rules and regulations, and their own controversies, within their own organizations.

Such controversies usually call for the examination and cross-examination of witnesses, and the consideration and weighing of testimony by governing bodies or directors of such organizations, before any resort can be had to the courts for final settlement.

Even in the religious world there are disputes continually arising, where charges of "heresy" are preferred against some priest or preacher, such as the recent con-

troversy in the Christian Church between Mrs. Augusta E. Stetson, the leader of the First Church of Christ, Scientist, in New York, and the "Mother Church" in Boston, where the truth or falsity of certain charges against Mrs. Stetson for "mental malpractice," so called, were under investigation, and where conflicting testimony and evidence had to be considered and weighed by the directors and those whose duty it was to conduct the investigation and examine the evidence.

Every business man at the head of any mercantile or industrial establishment, who has large numbers of employees under his control, is frequently called upon to determine the truth, and to decide promptly many important questions of fact upon circumstantial evidence, and conflicting and contradictory statements, derived from subordinates, employees, or other sources.

In our private affairs, in our everyday life, there are many disputed questions of fact of the utmost personal importance to be decided upon conflicting evidence.

All such questions, whether arising in organizations or in private life, usually depend upon evidence so conflicting and perplexing in character as to require skilful methods and subtle arts to apply the proper tests for getting at the truth when it lies hidden beneath human

motives, prejudices, passions, illusions, and the recognized fallibility of human faculties.

The general public, therefore, should naturally be interested in the correct methods of sifting out the truth of any controversy or disputed question of fact, in which they may for any reason become interested.

Professor Münsterberg, in his book entitled "In the Witness Box," has disclosed to the public some of the methods employed by the psychologist, and some of the results of his discoveries, as an aid in deciding controverted issues of fact.

There are no methods for ascertaining truth, however, that are superior to those in vogue in the English and American courts. Even in France the authorities are said to be contemplating a change to the English and American method of conducting their trials, because of the adverse criticism by the Press of the methods employed by French Tribunals, as exemplified this year in the Steinheil case, where the presiding judge, instead of the advocates on either side, conducted the examination and cross-examination of all the witnesses.

In all Anglo-Saxon courts the advocates have always been the principal actors in the drama of a trial, and it would seem, therefore, that the general reader

should be interested to know something of the methods and subtle arts employed by great advocates in the conduct of cases in court, so that the same methods may be made use of in the various investigations just referred to, even though such disputes may never become the subject of litigation.

It is not my intention to "magnify mine office"; but it is hardly possible to exaggerate the importance in any community of a class of men who have the varied and important duties to perform which devolve upon the advocate, whose assistance may be required by the greatest as well as the meanest individual in the most crucial juncture of his life—in the defence of his liberty, his reputation, or his fortune.

The general public, though often intensely interested spectators of a lawyer's skilful work in court in playing upon human nature, with its varied motives and passions, can have but a faint idea of the methods employed in arriving at the verdict which they applaud.

So, too, of those who enter our courts as spectators of the proceedings and who see the advocates or trial lawyers with such seeming ease playing their parts in that serious drama, drawing the truth out of the witnesses, arguing with the Court, making their speeches to the jury, consulting with clients, with no appearance

of effort or of labor, as if those multitudinous facts and that knowledge of the law came to them by *inspiration* — how few realize the years of toil through which this mastery of the art has been attained!

The purpose of this work, therefore, is to give the general reader, and young men who desire to become successful advocates, some practical knowledge of the arts of great advocates in eliciting the truth; to indicate also the methods by which they charm and convince both court and jury, and win them over to their side of the controversy.

A large part of the material of this book was originally in lecture form and as such delivered last spring at Fordham University, at the request of one of our Supreme Court Judges, and later, in the same year, at Columbia University.

Originally written without any idea of publication, these pages naturally fall far short of being a scientific treatment of the subject; and perhaps fortunately so, for otherwise they might be occasionally consulted but seldom read. They are published, in a somewhat modified form, in response to numerous requests from friends, both in and out of the profession.

I wish especially to disclaim any originality, either in the subject-matter, or, in some instances, the mode of

expression, in the chapters relating to the mental and physical qualifications of the advocate.

This subject was considered of much importance and was thoroughly discussed by English writers a century ago, but so far as I know has been only casually referred to by any American writer.

I wish also to acknowledge my indebtedness to the writings of Judge James W. Donovan, of the American Bar, probably the most human of all writers on this and kindred subjects. I refer especially to his "Modern Jury Trials," from which I have used several extracts.

The writer is aware of the difficulty of his task; but by giving such hints and suggestions as have been derived from his own experience after many years in our courts, and by besprinkling these suggestions with concrete examples and illustrative anecdotes, which are often of more lasting value than the most lucid discussions without the illuminating instances, he trusts the results will be at least useful, if not at the same time entertaining, to every one who may have occasion to employ similar methods in arriving at truth and justice in any field of human effort.

ADVOCATE AND OFFICE LAWYER CONTRASTED

CHAPTER I

ADVOCATE AND OFFICE LAWYER CONTRASTED

THE term "advocate" is commonly used to designate the lawyer engaged in the trial of cases in court, and whose special business and chief function is to deal with facts, either to elicit them from the witnesses or present them to the judge or jury. I shall have but little to say as to the duties of the office lawyer in his office practice as distinguished from the advocate in his court or trial practice.

The two branches of the profession require not merely different but opposite faculties, which, it seems, cannot well coexist in the same individual.

The distinction is one which many members of the legal profession are loath to admit. It wounds a lawyer's vanity to know that there is little or no hope of his becoming great both as an advocate and as an office lawyer.

If a man has a decided talent for court work, he is slow to admit that he is less profound as a lawyer than his contemporary at the Bar who has devoted his time

and attention strictly to his office practice and who can cite cases by the hour and can dictate the most important legal papers almost with closed eyes.

On the other hand, the successful and learned office lawyer often secretly believes that he could shine as well in court and might have achieved quite as great a reputation as an advocate had only circumstances or opportunity so decreed.

How seldom has it been found in the history of the profession that one personality has combined such conflicting qualifications as are required by these distinct branches of professional work!

Nature seems almost to forbid that this should be so.

How can one expect to combine, for example, the rapidity of thought, the promptitude of decision, the large knowledge of the world required of the advocate, with the slow judgment, the patient study of the books and of the statutes, the laborious plodding over papers and accounts, and the tedious attention to detail that is required of the office lawyer?

If we picture to ourselves the spectacle of some studious, painstaking, learned, staid, conservative, old-fashioned lawyer transplanted into an exciting court room by the side of his anxious client, amidst a crowd

of eager listeners, and at a moment's notice called upon to play the part of a great advocate, with "hands charged with electricity and face all ablaze with magnetism" on behalf of his quivering client — it becomes at once apparent that nature forbids the same man to play the two roles successfully.

This law of nature, as it were, has been always appreciated in the English courts. There the profession is divided into two branches, Barristers and Solicitors. The Barristers alone are allowed to speak in court. The Solicitors have the monopoly of office practice. The two branches of the profession are entirely distinct.

Already there is a growing tendency in this country to adopt, perhaps unconsciously, the English methods in court. Perhaps when our young men are mature at the Bar, some of these customs will have become well established, and it may be of interest to describe them.

There are at the present time about ten thousand Barristers in London, eight thousand of whom are not in active practice. Of the two thousand in active practice, there are about two hundred King's Counsel or Leaders, as they are called (because in England every important case has to have a Leader), and the

remaining eighteen hundred are Juniors, who are not allowed to "wear the silk."

Only the King's Counsel are allowed to wear a silk gown, and, in order to become a King's Counsel, application must be made to the Lord Chancellor.

Recently, out of ninety applications in one year, only fourteen were granted, and at the present time there is considered to be a scarcity of King's Counsel in active practice.

Indeed, out of the two hundred Leaders actively at work, at least fifty devote their time exclusively to Parliamentary work, fifty to the Chancery Courts, about fifteen to the Admiralty Court, and a few entirely to divorce matters, leaving only about twenty-five King's Counsel now in active practice in the City of London. As a consequence, these twenty-five, or the majority of them, are so busy that they are often required to conduct two or three cases at a time.

Being themselves Leaders, they always have a Junior barrister associated with them.

The Junior sees all the witnesses, prepares the written issues, opens the case, and examines every other witness-in-chief, alternating with the Leader.

The Leader, on the other hand, cross-examines all witnesses, argues questions of law, and sums up to the jury.

The Junior barristers cannot practise in the higher courts without a Leader, and the Leaders, on the other hand, according to the etiquette of the profession, cannot go into the lower courts.

Some Junior barristers, therefore, long before they are successful in obtaining their silk gown, enjoy a very large practice and income through their work in the lower courts.

The Leaders never see a client or any witness, and even the Juniors are merely consulted by the Solicitors all through the early stages of the case prior to the actual trial in court.

The Solicitors, therefore, are the only lawyers who come in close contact with the witnesses themselves.

When an important case is to be reached for trial, a brief of all the statements of the witnesses, case gossip, material for cross-examination, law points, etc., is submitted to some one of the twenty-five King's Counsel, with the price that will be paid for the trial marked upon the brief.

For instance, if it is proposed to defend an ordinary damage suit, the custom is to mark about £20 on the brief, and the King's Counsel accepts or rejects it as he likes. If he accepts it, he agrees to the fee, which is to cover the first five hours in court. If, for example,

a case begins at two o'clock one day, the £20 retainer is supposed to cover all services until two o'clock on the following day, when the King's Counsel is supposed to make an arrangement for a "refresher," which in a £20 retainer would be about £10 for the second five hours.

The Solicitors, on the other hand, are only allowed to charge fixed fees; that is, fees arranged by statute, and there can be no deviation from these fees unless by a special agreement with the client, which agreement must be in writing and signed by the client himself; and even then, so great is the protection of the public against overcharges by Solicitors, the agreement with the client can later be submitted to the court, and, if considered by the court excessive, reduced, and the original contract in writing abrogated.

The Solicitor is allowed to charge ten shillings for an interview with any client who brings a case to him, and he can charge no more unless under a special contract in writing.

He is allowed to charge three shillings six pence for each letter; so many shillings for an interview with a witness, according to the time occupied, etc. He charges for each filing of a paper, and, although the price of everything he does is regulated by statute in as much

detail as the price of groceries would be, yet there is so much red tape in a solicitor's office in preparing a case for trial that in the most ordinary litigation, even in a plaintiff's suit for an accident, the statutory fees will run up to about £80, or $400.

Of course, among Solicitors of the first rank, these fees are often disregarded by the Solicitor's apprising his client at the outset that his opinion "will cost 100 guineas," or 500 guineas, as the case may be, and by the client agreeing to pay this sum in advance. In such a case the provisions of the statute are altered by mutual agreement. But in the great majority of cases the statutory fees are strictly adhered to. It should be noted, however, that in England these fees of Solicitors as well as Barristers are part of the taxable costs of a case and are added to the judgment, the losing party having to pay his adversaries' expenses as well as his own.

In important cases, when it comes to submitting the brief to the Barrister, the fees often run up to a thousand guineas, or more, according to the nature of the case and the amount involved.

It is considered in England against the etiquette of the profession to take any contingent fee whatsoever, and any Solicitor making a bargain with his client to

accept a percentage of his recovery in lieu of his rightful fee would be immediately struck off the rolls, and any Barrister guilty of such conduct would be disbarred.

In mediæval times the theory of the law was that the Barristers would charge nothing for their services. In those days there was a pocket in the rear of the gown in which the client would deposit such moneys as he chose for the Barrister and his Clerk. Even to this day the Barrister has no standing in court as a plaintiff suing for his fees. He either receives them in advance or he trusts to his Solicitor. Neither can a Barrister be sued for any erroneous opinion he may give.

In the height of the court season in London, as already stated, there are so few King's Counsel in active practice that oftentimes a Barrister will find himself obliged to conduct two and three trials at a time. His habit, therefore, is to allow his Junior in each trial to proceed without him as far as possible in the unimportant parts of the case while he travels from one court to another trying to keep abreast of all his different litigations.

This, however, can always be avoided by any client who wishes to pay double or treble fees to be sure of having his Counsel remain in court throughout the entire trial.

In order to become a Barrister in London, one must be proposed and seconded by a Bencher with the same formality as to join a social club.

The Societies of Barristers are made up practically of graduates of the law schools, and most of the Barristers are graduates from Oxford and Cambridge. A knowledge of both Latin and Greek are required in the examination for the Bar.

Attention has been called to these customs of the profession in England somewhat in detail because, as already stated, some of these methods are gradually being introduced into the practice of our profession in the large cities in our own country, especially in New York.

In New York City there are about twenty-five or more advocates who devote themselves almost exclusively to trial work; many of these seldom see any of their witnesses, but for this purpose have junior trial lawyers associated with them. These junior trial lawyers do all or most of the work of the preparation for the trial itself.

In this way by far the best results are obtained both for the client and for the courts. Causes are more speedily and correctly tried, and the outcry against the so-called "delays of the law" is gradually subsiding.

In London it is now often possible to try a case within a few weeks after the joinder of issue.

PHYSICAL ENDOWMENTS

CHAPTER II

PHYSICAL ENDOWMENTS

WHENEVER a young man thinks of entering the legal profession, I would urge upon him, before making up his mind whether he will direct his energies toward becoming a great advocate or fix his choice on the less arduous duties of the office practitioner, to subject himself to the closest self-inspection to see whether he possesses the proper physical and mental endowments that are so essential to success in this branch of this profession.

Nature has not cast all individuals in the same mould, and it is vain to struggle against her decrees; for a pursuit that is distasteful is never prosperous. On the other hand, where there is a natural fitness for any occupation, success is almost certain to follow industry and perseverance.

First of all, have you the physical requirements of the advocate? Have you the healthy frame capable of enduring the long-continued exertion of mind and body, the confinement of study, the excitement of public speaking, the long day of labor, the work by night, the

excited, broken sleep that follows a prolonged trial in a stifling court room? It is almost impossible to exaggerate the physical strain of court work. Without these strong physical endowments, therefore, abandon all idea of becoming a successful advocate, and choose for yourself the less strenuous and more placid work of the office lawyer.

Next, have you the requisite voice for the work of the advocate? A thin, small voice, womanish and weak, will fail to impress the soundest arguments upon an audience over whom the show of things has more influence than the substance it hides.

It is difficult not to associate a small voice with a feeble intellect. One may have a rasping voice, disagreeable to the ear. This is a defect, but not a fatal one, and is capable of being cured by modulation and training. Many men have succeeded with extremely harsh and squeaky voices.

The hopeless voice is the small voice — the effeminate voice. This is a natural barrier which industry cannot remove and which no amount of capacity in other respects can overcome.

On the other hand the voice that "reaches the real melody of a song" is a wonderful weapon of the advocate and exerts a mighty influence both upon witnesses

and juries. It lends the greatest variety to the trial. It commands the attention both of the court and jury. It is a part of the advocate's charm which endears him to his hearers and often slurs over and makes amends for glaring defects in his arguments.

Thomas Jefferson was a striking example of a great lawyer who was obliged to become an office lawyer because he had a voice so weak and husky that he could not succeed as an advocate.

John T. Morse, Jr., in his life of Jefferson, says that the weakness of Jefferson's voice, more than any other thing, prevented him from becoming successful in trial work.

Henry Clay, on the other hand, was a great advocate, one of the chief reasons being that he had a voice that was marvellously musical and of rare power.

The voice, as has been truly said, is a gift that is born in a man, like speed in a race-horse.

Much, however, can be done by practice to overcome defects in the voice.

Everybody knows that Demosthenes, in order to overcome an impediment in his speech, used to declaim by the seashore with pebbles in his mouth.

The young advocate should early learn to adopt "low tones to reason," "strong ones to denounce," and "words full of feeling to move the sympathies";

whereas tones that capture the judgment and overcome prejudice are full of kindness and music.

In addition to having a suitable voice to become a good advocate, one must have an attractive personality.

Most great advocates have been noted for some marked physical attraction or personal magnetism.

Daniel Webster's personal presence was one of the great elements of his success. It was a fit companion and even a part of his genius and was the cause of his influence and of the wonderful admiration which followed him. "When still in college, he had so developed his physical frame that he had a most commanding presence, although as an infant he was weak and sickly and was deemed to be too weak and delicate for manual labor. He was tall, quite thin, with high cheek bones and a dark skin. Those who heard him never forgot the look of his deep-set eyes and the sound and solemn tones of his voice, his dignity of mien and his absorption in his subject."

In speaking of himself, he said that he was "known in the village where he taught school as 'all eyes,' and there was never a time in his life when those who saw him did not afterwards speak of his looks, generally either of his wonderful eyes or of his imposing presence."

Dunning is one of the most remarkable instances on

record in England of the triumph of genius over physical defects. He is said to have labored under the disadvantage of a singularly unprepossessing exterior. He was the ugliest man of his day, without being in any way what would be called deformed. His figure was short and stumpy, his complexion was sallow. He had a snub nose, giving a remarkably plebeian expression to his countenance. His whole frame was uniformly weak. He labored also under an affection of the nerves, which occasioned his head to be in a state of perpetual oscillation. His voice was almost repulsive. His throat was always half choked with phlegm, as though laboring under a chronic catarrh. Yet, in spite of all these drawbacks, Dunning became the first orator of his day.

An amusing story is told of him. One evening a client called upon him at his chambers; he was not in, and his clerk directed the client to a coffee house where he said the learned advocate generally spent his evenings. When the client reached the coffee house, he inquired for Mr. Dunning; the waiter declared he did not know any such person. "Then go upstairs and see if there is a gentleman there with a face like the knave of clubs, and if so, tell him he is wanted." The waiter went upstairs and immediately returned with Dunning.

I have laid stress upon the physical qualifications of the advocate because so much depends in court upon the personal presence and magnetism of the speaker, especially in jury trials. Juries soon become attached to or repulsed by the personality of the advocate conducting a trial before them. The advocates become the principal actors in the drama, as much as though they were playing the same roles on the stage.

Personal magnetism, therefore, is one of the most important of all the attributes of a good trial lawyer. Those who possess it never fully realize it themselves, and only partially perhaps when under the influence of a large audience. There is nothing like an audience as a stimulant to every faculty. Under such a stimulus the magnetic force of the advocate becomes almost irresistible. He seems to be able to concentrate all the attention of his hearers upon the vital points in the case; he imparts weight and solidity to all he touches; he unconsciously elevates the merits of his case; he comes almost intuitively to perceive the elements of truth or falsehood in the face itself of the narrative, without any regard to the narrator, and new and undreamed-of avenues of attack and defence seem to spring into being almost with the force of inspiration.

MENTAL ENDOWMENTS

CHAPTER III

MENTAL ENDOWMENTS

PERCEPTION, keenness of observation, clearness and quickness of comprehension have always been spoken of as the most essential mental endowments in the advocate.

They are born with an advocate, else he was born for another calling.

In the trial of a case each phase of it must be seen and understood in its entirety and in its detail almost at the same instant and with the rapidity almost of intuition. There is no time for an advocate to ponder upon a thought and turn it over in his mind and master it by degrees. He must grasp it faster than speech can convey it.

It is by this faculty of intuitive perception that the advocate reads the thoughts of the witnesses. It shows him the bearing of every fact as it is developed at the trial and enables him to adopt suddenly a course of action although it may be entirely different from the one he originally started out with. Perception has been

called the corner-stone of the mental faculties of an advocate.

Next to it, and always rated as second only in importance, is the faculty of sound and prompt judgment. Perception and judgment have been called partners for all practical purposes, perception supplying the material upon which the judgment operates.

Good judgment is less frequently found, and alas, is usually less cultivated.

It is seldom, if ever, that an actual trial proceeds along the exact lines that have been mapped out before the court opens. The witnesses tell a different story in the witness-box from that which they have repeated to counsel. Cross-examination brings new phases into a case, develops new facts, and often gives an entirely different turn of the scale balance, where some little thing said or unsaid may unite or divide a jury.

It is the advocate who can quickly perceive these changes and who has the experience, wisdom, and sound judgment to avail himself of their advantages or defend himself against their apparent consequences, who makes the successful trial lawyer.

It is this little difference in skill (watching with alertness for the lucky turn) that clients pay for, and, I am sorry to add, the average trial lawyer usually learns

after the verdict what would have benefited his case if seen in time.

An advocate, of all men, must think, and think constantly and quickly through every stage of his case, and train his mind for adverse turns of evidence.

This quality of knowing just what to do and when to do it is sometimes called the sixth sense of a counsel.

It comes to him only through long practice.

The sense of fine work in law suits is a cultivated gift that increases with use like the skilled hand of the surgeon or the supple fingers of the trained musician.

It is not too much to say that it is almost invariably the case that some little turn in the evidence makes for victory or defeat, and it is this power of the advocate to meet this turn instantly, to perceive its effect, and the good judgment to turn it to his own advantage, that leads every experienced trial lawyer to place perception and judgment among the first mental prerequisites for success in court work.

To a rapid and clear perception and a ready and accurate judgment is usually added the power of imagination.

Imagination gives shape to thought, and infuses a glow and color into expression and makes word pictures.

It is not enough for an advocate to have in his own

mind an accurate vision of a place or a person or an event. He needs to convey to other minds the picture painted on his own. He has to convince judgments for the most part slower than his own, and must impart ideas to persons to whom words do not always have the same meaning as that which they present to himself.

How often have we observed the difference with which some speakers will hold the attention of their audiences. We listen with admiration to the discourse of some learned advocate whose composition is perfect, whose language is scholarly, whose rhetoric seems flawless, whose manner is dignified, whose phrases are carefully rounded, whose tones are solemn, and at the end it seems to have been an able speech. But nothing has brought conviction to our minds. We can hardly recollect the different steps of the argument. The impression finally left upon our minds is that it was all words. The words have entered at our ears, but with all our desire to receive them understandingly, they do not write themselves on our memories.

Let such a speaker be followed by another, of different character, not quite so classic or correct in language, so close in argument, but we listen, and gradually, instead of an effort to keep the attention alert, we cannot choose but hear. We become ourselves witnesses

to the events narrated and all our sympathies are kindled. We see, we comprehend, we are convinced, and, as the speaker sits down, we are satisfied that he has the right on his side.

The faculty by which this triumph is effected is the art of the advocate's imagination.

In addition to perception, judgment, and imagination, there should be the further faculty of sincere emotion. Our minds are so constituted that any emotion in another, strongly and naturally expressed, excites a corresponding emotion in ourselves.

If the advocate himself does not feel strongly and sincerely, by no art can he excite through sympathy the feelings of his audience. It is his sense of right, his indignation of the wrong, enlisted in the cause he is advocating, making themselves visible even on his face, uttering their own natural and appropriate language, that kindles sympathy in the minds of the audience.

An advocate needs also undaunted courage and resolute energy in attack or defence. He needs self-confidence and unflinching firmness. He needs the ability to concentrate his whole mind on the matter immediately before him, and above all, he needs the power of clearness and simplicity of expression.

In advocacy, facts are always the foundation of argument, and the force of his argument depends upon the clearness with which the advocate presents his facts.

I shall have something to say on the subject of clearness and simplicity when we deal with the opening and closing speeches to juries, but clearness is equally important in all branches of a trial, especially in the direct examination of witnesses, in developing the facts in such good order and with such simplicity as to be grasped and retained by the most ordinary minds.

One of the great secrets of the success of Lincoln, who, before he became President, won nearly all of his jury trials, was because he was such a master of clearness and simplicity. It was one of the chief great mental endowments of Lincoln, but it was a power which he carefully cultivated in his boyhood, and highly developed only by hard labor.

Years later he related his experience to an acquaintance who had been surprised by the lucidity and simplicity of his speeches and who had asked him where he was educated. He said, "I never went to school more than six months in my life, but I can say this, that among my earliest recollections I remember how, when a mere child, I used to get irritated when any-

body talked to me in a way I could not understand. I do not think I ever got angry at anything else in my life, but that always disturbed my temper and has ever since. I can remember going to my little bedroom after hearing the neighbors talk of an evening with my father and spending no small part of the night walking up and down and trying to make out what was the exact meaning of some of their to me, dark sayings. I could not sleep, although I tried to. When I got on such a hunt for an idea, and until I got it, or I thought I had got it, I was not satisfied until I had repeated it over and over, until I had put it in language plain enough, as I thought, for any boy I knew to comprehend. This was a kind of passion with me. It has stuck by me, for I am never easy now when I am handling a case until I have bounded it north, and bounded it south, and bounded it east, and bounded it west."

It was perhaps this solid training of Lincoln's natural faculty for clearness and simplicity of statement that accounts for his ability to deliver that immortal Gettysburg speech which is regarded as one of the finest passages and models in all literature for simplicity, clearness, brevity, and beauty, both in matter and in form.

It is with this clearness of expression that the advocate is able to write his own "convictions on the hearts of the jurymen" and "engrave them on their bones."

Another rich gift to a trial lawyer is a good memory. This is something which cannot be over-cultivated. The simplest trial has so many little details that must always be kept in mind, and often it is the smallest detail that points the finger to the truth of the contention.

I have also said something of the need of ability in an advocate to concentrate his whole mind upon the matter immediately before him. This power of becoming absorbed in his subject must not, of course, be developed to such an extreme degree as to put him asleep as to other equally important matters.

An amusing story is told of Mr. Sergeant Hill who was not only the most eccentric but also one of the most learned of the English lawyers of his time. He had the habit of becoming so absorbed in his profession that it rendered him perfectly insensible to all objects around him. He was engaged to an English heiress, and on the morning appointed for the wedding, went down to his chambers as usual; but, becoming immersed in business, forgot entirely the engagement that he had for that morning. The bride waited for him so long

that a messenger was despatched to his chambers. He obeyed the summons, and, having been married, returned to his work. At about dinner time, his clerk, suspecting that the Sergeant had entirely forgotten the proceedings of the morning, ventured to recall them to his recollection, and sent him home to dinner!

EDUCATIONAL QUALIFICATIONS

CHAPTER IV

EDUCATIONAL QUALIFICATIONS

Good physical and mental endowments are not all. The advocate must also be well equipped for his work by education and general knowledge.

It has often been said that the duties of the advocate require a greater intelligence and a broader knowledge, especially of men and things, and the actual business of life, than any other profession.

The minister, when delivering any particular sermon, has his one subject to deal with and needs little knowledge of any topic not associated with his own. All else is ornamental, not essential. He can be less guarded in his statements. His audience has no opportunity to talk back. There is no opposing lawyer to reply.

A senator or statesman does not necessarily require such wide information, nor such correct and rapid judgment, competent to persuade or convince. He may devote himself to restricted lines of study or become great on one subject and may obtain a hearing

on account of his position or acquaintance with a single topic to which he brings the wisdom of his study and experience.

But it has been said of the advocate that "He cannot be wise on one subject alone. His information must be as universal as the range of human inquiry. His intelligence must have no limits but those of the human mind."

Charles Sumner once wrote a friend of his at the Harvard Law School: "A lawyer must know everything. He must know law, history, philosophy, human nature, and, if he covets the fame of an advocate, he must drink of all the springs of literature, giving ease and elegance to the mind and illustration to whatever subject he touches."

Think for a moment of the variety of the advocate's employment. To-day he is called upon to defend a client in some commercial case involving, among other things, intricate questions of bookkeeping; to-morrow he appeals to a jury for damages for defamation of character. He may be called upon to defend in a homicide case, involving himself in the mazes of physiology, chemistry, and pathology. One hour he tries an ordinary damage suit founded upon the negligence of some railroad company; the next he is plunged into an exam-

ination in lunacy, where all the nice distinctions connected with the examination and cross-examination of nerve specialists are involved.

He has little time for previous "cramming." He must be prepared beforehand with sufficient general knowledge on these various subjects so that he can turn his attention to his new task with that power of absorption of its intricate details which plays such a wonderful part in the successful conduct of litigations.

It is the one branch of the profession in which a man cannot disguise his deficiencies.

The office lawyer may be almost altogether unskilled in the law, yet if he have good common sense and a good professional reputation, he can readily transact his business almost as satisfactorily as the most profoundly read of his associates, because he can obtain his law from his associates, when he requires it, and his practice from a clever clerk.

Not so with the advocate. He must stand on his own merits in court before the most critical of audiences, judge, jury, clients, the public; here he subjects himself to continuous criticism, often unfriendly; here he exposes to the full light of day his knowledge of the law, his knowledge of things in general; his powers of persuasion or the lack of them, his clearness of expres-

sion, his powers of perception, such as they may be, his good or bad judgment, his memory, his imagination, his powers of concentration of mind, and all the characteristics which make for success or failure.

It is often said that the lawyer of the present day is less scientific than the lawyer of the past, though in amount of reading in no way inferior. I am not sure that I agree with this statement.

There can be but little doubt that students now enter the Bar far better lawyers than formerly, owing to the superiority of our law schools and the careful training the student receives during the two or three years spent there, and all of our methods of acquiring legal information have vastly improved since the olden days.

I am assuming that a young man enters upon his work as an advocate fully equipped professionally so far as study at law schools will permit.

It is assumed also that any man who has resolved to venture upon the profession of advocacy shall have received a preliminary training at school or at college.

But all this education is really little more than the foundation, for when young men imagine that their studies are completed, they are, in fact, but just begun. Experience soon proves this.

The real object of a man's going to college is to get a thorough mental training which makes his after life more useful to himself and to the world.

And I would urge those young men who aspire to greatness in advocacy, to read. Read everything.

I remember well in my student days that the biographies of the great men of all ages had the most stimulating effect upon me. I used to keep nailed to my bedroom door a long sheet of paper on which was written every book that I read during the winter. The list would gradually grow until the paper reached to the floor, such was my effort to cultivate my intellectual faculties and to improve to the utmost what little of that magnificent instrument called the mind nature had seen fit to bestow upon me.

To those who have never given much thought to the subject, it may be instructive to consider what may be done by the practice of devoting, with regularity, a small portion of each day to general reading. A student can read thoroughly and digest one page of an ordinary book in about two minutes. Supposing two hours in the course of the day were set aside for such occupation. The result would be 60 pages each day, or nearly 500 pages a week, 26,000 pages a year, or more than 85 volumes. And yet it is safe to say that

almost every one wastes at least two hours out of each twenty-four that might be utilized in this way.

To be a good advocate, therefore, I repeat that one cannot know enough. All the arts and sciences of every department of human industry and knowledge are liable to be involved in matters that come before him.

A young man seeking to become an advocate should read books that inform, books that educate; books that inform, fill the mind with facts, such as history and science. Books that educate are those that, among other things, cultivate the reasoning faculties, such as logic, mathematics, philosophy, mental and moral, and political economy.

Physical science, in its various departments, should be delved into; also history, physiology, psychology, sociology, the science of government, mental philosophy, logic, rhetoric, the fine arts, the useful arts, mechanics, bookkeeping as usually practised in merchants' offices; in fact, Sir Henry Finch once cleverly summed it up in this view: "Sparks of all sciences in the world are taken up in the ashes of the law."

A young advocate should familiarize himself, so far as practicable, with the poetry and general literature of some of the leading civilized countries of all ages,

because of their humanizing and cultivating influences, such as in time become stamped upon a man's face, his voice, and his manner; this in itself is a veritable letter of recommendation to the bearer.

Of course it goes without saying that an advocate should be thoroughly prepared in the art of oratory.

Great advocates, as a rule, have been great speakers and their power of oratory has been obtained only after great labor.

Wendell Phillips became famous by his Lovejoy speech at Faneuil Hall, Boston. Prior to that time he had spent many years in obscurity in preparation for some such opportunity which was certain to reward his industry. He told the professor of elocution who taught my class at Harvard that he, Phillips, when a student at Harvard had declaimed many of Burke's speeches hundreds of times in the woods round about Cambridge.

Wendell Phillips was so painstaking about the details of his oratorical work that whenever he ordered a new coat, he always had his tailor make the sleeves very long, so that when he made his characteristic descriptive gesture, the coat sleeves would come just to the right point of the cuff, thus giving a graceful appearance.

Lord Mansfield was extremely admired while at the

Bar as a graceful and fluent speaker. He, too, at his university, devoted himself to the study of the great orations of antiquity. He even translated many of Cicero's orations into English and then back again into Latin.

Mansfield used to practise the graces of a speaker before a looking-glass, with some critical friend sitting by his side as censor!

Edward Everett practised most of his speeches before a mirror, and Henry Clay attributed his success in speaking largely to his practice of committing speeches to memory and debating.

It may be confidently said that almost all famous orators and advocates have stored their minds with beautiful passages, quotations, and maxims from great authors, and have later used them in their own speeches, when opportunity presented itself.

There are, however, many excellent and successful trial lawyers, both at the English and American Bar, who have very few of the graces of the great orator.

Among the educational qualifications of the advocate, his moral training must not be overlooked. It is impossible to exaggerate the importance of character. Juries need to be convinced of the honesty of purpose and truthfulness of the advocate. Otherwise they will

look upon him with suspicion, distrust his assertions, and however great his ability, and brilliant his oratory, listen to him as an actor merely, his emotions feigned, and his argument an ingenious fallacy.

It has often been said that the quality that wins more clients than eloquence is integrity, and that "integrity without genius is better than genius without integrity," that "honesty is wisdom as well as virtue" equally in the profession of the advocate as in all other pursuits.

Certain it is that an established reputation for honesty is an open sesame into the ears and hearts and convictions of judges, juries, and audience.

An established reputation for honesty not merely predisposes a man's hearers in his favor, but makes them listen because they know that whatever such a man says, he means. They are inclined to follow his arguments with attention because they are confident that all is fairly, candidly, and truthfully conducted.

The very appearance of such a man in a case is a distinct advantage to his client, who reaps the benefit of being represented by an advocate who has the reputation of being a man of strict integrity and a gentleman.

Alas, the converse of this proposition is also true, and we have many signal examples in our own com-

munity; but, for obvious reasons, I cannot comment upon them.

It has been said that to be a gentleman is rightly held in higher esteem among men than to be a nobleman, the latter being usually an accident of fortune, whereas the former is nature's endowment cultivated by education; and in this sense of the term, gentleman is used not as descriptive of any class or calling, social or otherwise, but simply to denote the man who respects the rights and feelings of others and establishes a sympathy between himself and every other soul that is. "We have all of us one human heart."

It is especially necessary for an advocate to cultivate the intuitive sense of right, for his path is beset with temptations so insistent that it needs something more prompt than a slow calculation on his part to resist them. In the hurry of the trial the advocate has no time for deliberation upon the rectitude of some suggested course. He must rely upon that inward monitor which whispers in the heart of every true man.

OPPORTUNITY AND REWARDS

CHAPTER V

OPPORTUNITY AND REWARDS

WHILE a young man may possess all the necessary qualifications for a successful advocate, he must nevertheless have impressed upon him the importance of being always on the alert to seize the first favorable opportunity to demonstrate to the world his right to be recognized as an able advocate.

Indeed to recognize and seize the opportunity is so vital as often to determine his whole future career and destiny.

I cannot better express this idea than in the words of Senator Ingalls, who thus spoke of "Opportunity":—

"Master of human destinies am I!
Fame, love, and fortune on my footsteps wait.
Cities and fields I walk: I penetrate
Deserts and seas remote, and passing by
Hovel and mart and palace, soon or late
I knock unbidden once at every gate!
If sleeping, wake; if feasting, rise before
I turn away. It is the hour of fate,
And they who follow me reach every state

Mortals desire, and conquer every foe
Save death; but those who doubt or hesitate,
Condemned to failure, penury, and woe,
Seek me in vain and uselessly implore.
I answer not, and I return no more!"

Lord Thurlow's ultimate rise was owing to a chance opportunity to display his wonderful attainments. He had an extraordinary way of disposing of his time. He gave up his nights to unremitting study, and the hours of daylight he spent among the coffee-houses, among the wits and rakes, the very idlest of the idle. One evening when at a favorite coffee-house where several of his profession were assembled, the conversation turned upon the famous Douglas case, which was then about to be tried. Several of the counsel engaged were present. Some one observed that it was a great pity that no barrister had been found who was willing to go through and methodize the immense amount of evidence in the case. Thurlow remarked that, "Perhaps I would be willing to undertake the job," with the result that it was confided to his care; and so great was the ability which he displayed in discharging this duty that he was given the brief in the case itself, and thereby was brought in contact with some of the most distinguished persons in the country, with whom he managed so effectually to ingratiate himself that he

succeeded in persuading the Duchess of Queensbury to exert her influence to obtain for him a silk gown; and Thurlow, in addressing the House of Lords, in the Douglas case, did so as a King's Counsel, although almost unknown at the Bar.

Lord Erskine also, like Thurlow, was alert to seize the favorable opportunity, and the circumstances surrounding his rise to prominence at the Bar were such as to justify a reference to them. Erskine's pecuniary circumstances were such as to preclude the possibility of his adopting any of the learned professions. He went to sea at the age of fourteen and obtained the temporary rank of lieutenant, but his chances of promotion were so slight that he afterwards entered the army, where he remained for the period of six years, when he determined to try his chances at the Bar. The following is an abbreviated account, as told by himself, of the circumstances to which he owed his celebrity: —

"I had scarcely a shilling in my pocket when I got my first retainer. It was sent me by a captain in the navy. It was to show cause at the next term of court against a rule to be obtained against him, calling on him to show cause why a criminal action for libel should not be filed against him. I had met this captain at a friend's dinner table and he had been told that I had

just been called to the Bar, but had formerly been in the navy, when he exclaimed, "Then, by God, I will have him for one of my counsel." I trudged down to Westminster Hall, when I got the brief, being the junior of five who would be heard before me, and never dreamed that the court would hear me at all. The argument came on. Several counsel were all heard at considerable length and I was to follow. Fortunately, one of the judges was obliged to retire once or twice in the course of the argument because he was afflicted with strangury, which so protracted the session of the court that Lord Mansfield said that the remaining counsel could be heard the next morning. This was my opportunity. I had the whole night in my chambers to arrange what I had to say the next morning. I talked to the court with their faculties awakened and freshened and succeeded quite to my own satisfaction, and, as I marched along the hall, after the rising of the judges, the attorneys flocked around me with their retainers. I have since flourished, but I have always blessed God for the providential strangury of poor Hargrave."

It is said that the annals of English advocacy do not record a triumph more sudden or better earned, and it has been reported that when Erskine left the court

he had thirty briefs pressed upon him by admiring attorneys who had witnessed his brilliant effort. Just before this triumph, somebody had met Erskine in Westminster Hall and congratulated him on his good looks and apparent flow of spirits. "Why," said he, "I ought to look well, for I have nothing to do but to grow, as Lord Abercorn says of his trees."

Again assuming that one has the necessary qualification for an advocate, the question is often asked, whether he can succeed without money and without influence?

I have read that in all the history of England there have not been over thirty great advocates who started their profession without personal means, either inherited or advanced to them during their studies and early struggles at the Bar by influential friends.

Our country is full of examples to the contrary, and even in England, also, there have been some noted instances of success in spite of poverty and adverse circumstances.

It is said of Sir Francis Pemberton that his early life gave little prospect of his future eminence. "In his youth," says Burnet, "he mixed with such lewd company that he quickly spent all he had and ran so deep in debt that he was cast in a jail where he lived many years,

but he followed his studies so close in the jail that he became one of the ablest men in the legal profession."

Lord Mansfield, in the early part of his life, was also involved in the greatest pecuniary difficulties. In his youth he gave up all idea of following the law as a profession and decided upon taking orders in the ministry. One of his father's friends, trying to dissuade him from such purpose, offered him £200 a year if he would go into law. "It was to this kindly act that England owes all the benefits of the law received from this upright and conscientious judge who so long presided as Chief Justice of England."

John Phillpot Curran, Ireland's most famous advocate, always boasted that his only asset when "called" to the Bar was "a pregnant wife."

Few men have greater difficulties to struggle with in early life than had Lord Thurlow. His father was at the head of a small parish in Suffolk, England, and used to say that he could give his children nothing but a good education.

For some years after Thurlow was called to the Bar he was wholly unknown as a lawyer. So slender were his means, that while travelling the circuit where he would practise, he was compelled to resort to the most extraordinary expedients in order to defray his expenses.

It is recorded that he once found himself utterly destitute of money, his usual resources fully unavailable. How to defray the expense of reaching the next assize town for a time baffled his ingenuity. At length he hit upon a scheme. He sent for a stable keeper and told him he wanted a good horse and asked him if he had one to sell. The stable keeper assured him he had one which he could confidently recommend. Thurlow then consented to take his horse on trial, and if he approved of it, to purchase it at a certain price. The horse was sent the next morning according to appointment. Thurlow used him for the purpose desired and then returned him to the owner with a threat of bringing an action against him for venturing to set a gentleman on such a beast whose faults rendered him fit for nothing but hound's food.

In our own country, in the case of Webster, his father and mother sold their farm when they were about sixty years old and practically gave up everything, in their struggle to secure an education for their sons Daniel and Ezekiel. After graduating from college, Daniel used to teach all day and then copy deeds at night in order to earn money enough to help his brother Ezekiel through college; and Ezekiel, in turn, after graduating, obtained a position as a teacher in a pri-

vate school which enabled him to help his brother Daniel to complete his law studies.

Abraham Lincoln's struggles with poverty were even more marked than those of Webster.

Indeed his early life affords a striking instance of what hard work, added to good natural endowments, will accomplish in becoming an advocate, and his early struggles also illustrate what a young man born in America may accomplish without the aid of wealth and even when handicapped with the greatest poverty.

Lincoln once told a friend that he had "read through every book he had ever heard of in his county for a circuit of fifty miles."

In his fondness for speech-making, young Lincoln "attended all the trials in the neighborhood and frequently walked fifteen miles to Booneville to attend court."

Lincoln started out for himself a few months before he was twenty-one years old, with absolutely nothing, "not even a suit of respectable clothes." It is said he "had no trade, no profession, no spot of land, no patron, no influence."

After twenty years' success at the Bar he gave this advice to a young man who wanted to know how to become a lawyer: "Get books, and read and study

them carefully," and then he added, "work, work, work, work; that is the main thing."

Henry Clay entered the United States Senate before the age of thirty, although he could not lawfully do so at that age, but the point was not raised, and his subsequent career as an orator and statesman is well known, as Speaker of the House of Representatives in Congress, and in the Senate, and as Secretary of State.

His father was a Baptist clergyman, and died when Clay was four years old. He had to work for the support of his family, and was often seen walking barefooted behind the plough.

He had no college training and his education was of the most superficial character. In fact it is commonly admitted that, with all his brilliant abilities as an advocate, he never worked his way into the front rank of the lawyers of his time because of his lack of systematic study and failure to acquire any profound learning.

Webster, on the other hand, had a broad foundation of education and he became a great lawyer as well as a great advocate.

Whereas the secret of Clay's success as an advocate was doubtless largely due to the hard work and self-training which he gave himself in the art of speaking, for in this field he did study and work hard.

These examples, of men who by the mere force of their own talents and persevering energy have conquered opposing circumstances and unfriendly fortune and from the humblest have risen to the highest stations, must surely afford encouragement to those whose position is unfavorable and whose prospects are gloomy; for it is a false and debasing philosophy which has proclaimed man to be the creature of circumstances. With much greater truth it has been said of him that, so far from being their creature, he is their creator.

"Parts and poverty," said the learned Chancellor Talbot, "are the only things needed in the law student."

"Pray, my Lord," asked a fashionable lady of Chief Justice Kenyon, "what do you think my son had better do in order to succeed in the law?" "Let him spend all his money, marry a rich wife, spend all of hers, and then when he has not a shilling in the world, let him attack the law."

Such sentiments as these it has been the fashion to laud. They are only partly true. It may well be questioned whether poverty and the difficulties which so often beset poor men have all the beneficial influences which are ascribed to them. Many men are hardened rather than softened by adversity. In many minds,

poverty, instead of stimulating to greater industry, produces disgust, indifference, and despair.

I have read that the unfortunate Donald, the author of "Vimonde," was asked how he was getting on with his tragedy, and he replied with indescribable sorrow, "Talk not to me of my tragedy. I have more tragedy than I can bear at home."

Lord Erskine said that the first time he addressed the court he was so overcome with confusion that he was about to sit down. "At that time," he added, "I fancied I could feel my little children tugging at my gown, so I made an effort — went on — and succeeded."

With some men this feeling would only have added confusion, if they realized that on their success depended the future welfare of their families.

But young men of energy and perseverance and steadfast purpose who may be entirely lacking in genius have much to hope for in the profession.

On the other hand, young men of genius have much to fear from indolent habits and from too great a reliance upon natural endowments. Many graduates recall the first scholars in their college days who, twenty years later, made mediocre real estate agents or tally clerks; and who cannot remember the so-called stupid

boys at school who became business giants in their manhood?

Advocacy is a branch of the profession open to all, where the promise of reward is held out to such as have industry and ability and where the prizes that await the successful are magnificent in the extreme.

In my opinion, there is no opportunity in any city in the world in any profession compared to that open to young advocates in the city of New York at the present time.

There are many instances in New York City that I could cite of accessions to wealth and distinction, but, for obvious reasons, I prefer to allude to some conspicuous examples at the English Bar.

In London, one of the leading King's Counsel is a man by the name of Rufus Isaacs. He started as a stock-broker and at the age of twenty-three failed, lost his seat on the exchange, then went to sea, and after a while drifted into the legal profession.

For some years he was found about the courts, willing to accept guinea fees.

Now his practice is one of the largest in England. He is a member of Parliament, often trying three cases at a time by day, and spending half of the night on his parliamentary work, in addition. At

the present time he is about fifty years old and has been approximately ten years at the Bar, and his income is reputed to be upwards of £30,000 a year.

Other similar noteworthy cases of the sudden rise of young barristers to "the silk" are F. E. Smith and J. E. Simon. Both received their commissions as King's Counsel at the age of thirty-five and both are members of Parliament, with a large practice.

The able advocate in every country, however, seldom, if ever, fails of reward from a purely monetary point of view, and finds himself available in addition for almost any public station in the gift of the people.

If any young man, therefore, feels that he possesses the physical, mental, and educational qualifications, and has the courage, will, industry, and perseverance to choose this branch of the profession, then I say to him, press forward in the race, full of heart, courage, and hope, determined to win the prize which is not often lost by those who seek it thus resolutely.

PREPARATION FOR TRIAL

CHAPTER VI

PREPARATION FOR TRIAL

SOME of the practical suggestions made in this and subsequent chapters are the result of lessons largely derived from the writer's individual blunders and mistakes during the years of patient toil on that difficult road of experience which young advocates are about to travel.

Book knowledge of the law has been likened to a chest of fine tools in the hands of an unskilled workman — excellent in themselves, but impracticable and useless without the experience and knowledge of how to use them. It is the advocate's business to know how to use his tools — his knowledge of the law and of the arts of practice in the courts.

An English lady once asked the then Lord Chief Justice what was necessary in order to win a case in court. He replied: "First, you need a good case, then you need good evidence, then you need good witnesses, then you need a good judge, then you need a good jury, and then you need good luck."

Alas, the law is not a lucky profession.

Napoleon used to say that the Almighty always seemed to be on the side which had the heaviest artillery; and in the trial of cases luck always seems to be with the advocate who has done the most hard work in the preparation of his case, and who has the most art in presenting it properly in court.

There are a hundred vexatious, difficult cases to one simple one.

In fact there are some advocates who never seem to have a "good" case. This might be called by them bad luck; but experience shows that almost the only kind of luck there is in court for such lawyers is bad luck!

It is the midnight oil that counts,—the painstaking, thoughtful, thorough preparation, the accurately drawn trial brief, candor and fairness in court, clearness in expression, the art of putting things,—and not luck, which wins cases.

Let us suppose that a new client presents a case to an advocate for his consideration—how is he to decide whether to take it or not?

If the case is clearly a bad one, it is his obvious duty, at the outset, to so advise the client and persuade him to abandon or compromise it. But how is he to tell whether the case is a meritorious one or not?

My suggestion to the advocate is that he sit down quietly with the client and let him go over all the details of his case in a natural way. Put him at ease; don't lead him; don't suggest how the facts ought to be in order to come within the latest decisions. Let him tell his own story, listen to his arguments, his reasons why he thinks he ought to win — the layman's common-sense view of his own case is often better than any legal opinion on the subject.

The advocate should examine what papers his client has to bring to him: contracts, letters, and the like. He should encourage his confidence, and persuade him to tell his adversaries' side of the story. Then begin and question him in detail. One fact or association often recalls another which perhaps had faded entirely from his memory. Finally, he should dismiss him and let him come back the next day with his mind refreshed on the new subjects that have been discussed between them.

It is remarkable what this method often brings forth. The client goes away, discusses the points raised, with his friends, or his partner, or his family, and the next day has many additional details to help the advocate in his decision whether or not he will accept the employment the client offers.

If he takes the case, he belongs to the client for all the honest work that is in him. A client can hire neither an advocate's conscience nor his manners. Beyond this, every attainment he has should be devoted to his interests. A court trial is serious business to the client. For weeks, perhaps months, he has thought of nothing else, has carried his proposed litigation around with him like a millstone around his neck. It is ever present with him at all his leisure moments; at his home, at his work, even in his dreams, he thinks and talks of little else, and finally when he selects an advocate, he wants a partisan—one who will represent him and fight for him and who will realize the responsibility.

The question whether or not an advocate has the right to accept the side of any case he believes to be in the wrong has always provoked much discussion, both in this country and abroad.

By the Roman law every advocate was compelled to swear that he would, under no circumstances, defend the cause which he knew to be unjust.

In Holland an advocate who appears in a proceeding which, in the view of the court, is iniquitous, may be condemned to pay the costs of the suit. Plato, in his Republic, enforced the rule that whoever should

plead a cause, knowing it to be unjust, if it be proved he had done so through a contentious spirit, was to be forbidden practising again in the courts. But if he had done so through a desire of gaining money, he was to be punished with death. Whereas, Lord Brougham, in addressing the House of Lords in England in defence of a client, has said that in his opinion "an advocate, by the sacred duty of his connection with his client, knows, in the discharge of that office, but one person in the world — that client, and no other. To save that client, at all hazards and costs to others, is the highest and most unquestioned of his duties; and that he must not regard the suffering, the torment, or the destruction he may bring upon any others; he must go on, reckless of the consequences, if his fate should unhappily be to involve his country in confusion for his client."

Of course this is an extreme view of the question. But should an advocate be called upon to consider whether his client be morally guilty — or not? Is it not rather his duty to state, as forcibly as he can, the best arguments he can devise in his client's favor, leaving the value of these arguments, as well as the merits of the case, to be decided by the individuals who have the power of reaching the truth, viz. the judge

and jury. The question is, Does the law declare the client guilty — with the moral guilt or innocence has the advocate anything whatsoever to do?

The advocate stands forward as the representative of his client; he tells his client's story, and it is known that he is doing no more; the same allowance is made for everything he says that would be made were the party himself the pleader. But certainly the advocate has no right, nor is it his duty, to do that for his client, which his client has no right to do for himself. "Justice," says Sidney Smith, "is found experimentally to be best promoted by the opposite efforts of practised and ingenious men, presenting to the selection of an impartial judge the best arguments for the establishment and explanation of truth. If he comes then under such an arrangement, the decided duty of an advocate is to use all the arguments in his power to defend the cause he has adopted, and to leave the effect of those arguments to the judgment of others."

Once accepted, each case should be to the advocate as if he might never have another opportunity in all his life of making his reputation at the Bar.

His first duty is to get to work. He should not postpone the preparation of the case. True, it may not be reached for trial for a year or more, and the temptation

to delay preparation is great; but it is likewise fatal. The first man on the ground usually takes title to the verdict!

He should get his client to bring his witnesses to him at once; should take their stories in detail, squeeze them dry of information; and be careful not to suggest any answers by his questions. He should always bear in mind that the same witness in the quiet of a lawyer's office, where he may want to appear important as well as obliging, is apt to tell an entirely different story from the one he will stick to when he takes his oath in a court room in the presence of the judge, jury, and audience, especially if he has heard other witnesses broken down by cross-examination.

Unless an advocate is careful, therefore, when he takes a witness's statement in his office, he will be entirely deceived by him. Nearly every witness is prone to exaggeration and can be easily encouraged to state as facts matters that are merely hearsay or his own inference.

Lawyers themselves are in large measure to blame for this state of things because they lead and push a witness too far.

Having obtained the statement from a witness, the next thing is to have it put in writing. Most men do

not take any written statement at all; others, a trifle more careful, dictate to a stenographer a statement which the witness signs; those who are still more careful have the witness verify it before a notary.

In my judgment none of these methods is correct. A signed statement is almost useless a year afterwards if the witness chooses to change his testimony for any reason.

Even if he has sworn to a typewritten affidavit, the witness invariably says that he did not read it over, that it was drawn up by a lawyer, and that he did not understand it.

The only safe way is to get the witness to write out his story himself, in his own phraseology, in his own way, and in his own handwriting, and then sign and swear to it; thus one has written evidence which will ever prevent that particular witness from injuring him. At the time of his preliminary examination the witness may be disinterested, even friendly, yet when the case is reached for trial, he may possibly be found in the employ of one's adversary; but the advocate can rest at ease and force him to speak the truth, so long as he has in his possession this statement written by the witness' own hand, and contents sworn to.

Before taking such a statement it is often well for

an attorney to cross-examine his own witness, pleasantly, with the object of finding out just what he really knows and why and how he knows it; how accurate his memory is, and how much he can rely upon him when he goes into court.

Many men tell altogether too much; they are honest, but they could not possibly know all they think they know.

One such witness hurts a case in court more than many good ones help it — if a jury does not believe a witness, they are apt not to believe any one called on the same side. It is almost an axiom that "a witness disbelieved is a witness against you" — the case at once assumes the appearance of being supported by perjury.

The most difficult thing in the world is to tell the exact truth — not from any intention to do otherwise, but I am referring to the unintentional mistakes of the normal mind. Memory is not alone responsible for this. There is the greatest difference between a man's powers of perception and his perceptive judgment.

Professor Münsterberg has published a book giving some most interesting accounts of his experiments with his students in his regular psychology course at Harvard.

Not long ago he made four simple experiments before some hundreds of his students in order to test

their powers of perception, having first urged them to be as conscientious and as careful as possible in their observation and replies.

His first experiment was to show them a large sheet of white cardboard on which fifty little black squares were pasted in irregular order. It was exposed for five seconds and then they were asked to write down how many black spots were on the sheet. The answers varied between twenty-five and two hundred.

His next question referred to the perception of time. He asked them to count the number of seconds which passed between two light clicks, and he separated these two clicks by ten seconds. The answers varied between one-half second and sixty seconds, the largest number of students judging forty-five seconds as the right time. It must be noted that these great differences in estimates showed themselves in spite of the fact that the students knew beforehand that they were to estimate the time interval. The variations would likely have been much larger if they had been asked, after hearing the sound, without their attention having been previously directed to the test.

And yet the witnesses in our courts are constantly being asked to estimate time under oath, and their judgments are relied upon by the court and jury.

In Professor Münsterberg's third experiment he tried to find out how closely rapidity is estimated. He took a large clock with a white dial, over which one black pointer moved once around in five seconds; that is, in one second the arrow point moved through a space of about a finger's length. He made the dial move for a whole minute and asked the students to watch carefully the rapidity of the arrow. The answers came back: seven miles an hour; fifteen miles an hour; forty miles an hour. In reality the arrow was moving at about one-third of a mile an hour. Not a few of the judgments, therefore, multiplied the speed by more than one hundred.

His fourth test was to ask his students to describe the sound they heard and to say from what source it came. He struck a large tuning-fork with a little hammer below his desk. Among a hundred students there were only two who recognized the sound as a tuning-fork tone; all the other judgments took it for a bell, an organ-pipe, a horn, a 'cello string, a fog-horn, a steam whistle, the growl of a lion; some called it soft and mellow, others rough and sharp and whistling.

To quote from Professor Münsterberg's book, he says: "Enough of my class room experiments. Might they not indeed work as a warning against the blind

confidence in the observations of the average normal man?"

While upon this subject, upon which considerable will be said when we come to the cross-examination of witnesses, attention is called to some of the illusions which are common to all men, and of which so little is commonly known, but which Professor Münsterberg refers to as follows:—

"A witness states that he saw in late twilight a woman in a red gown, or one in a blue gown. The faint twilight would still allow the blue-colored sensation to come in, while the red-colored sensation would have disappeared entirely! It would be black.

"Few realize that while we need never be in doubt whether we hear on a country road a cry from the right or the left, we may be utterly unable to say whether we heard it from the front or behind.

"A stab with the point of a dagger often feels like a dull blow to the person stabbed. We hear witnesses talk about the taste of poisoned liquid, and yet there may be no one in the court room who knows enough about physiological psychology to be aware that the same substance may taste quite differently on different parts of the tongue.

"Again, a witness may be sure he felt something wet,

and yet he may have felt really only some smooth, cold metal."

In addition to the pure sense perception, there are associations, judgments, and suggestions which permeate every one of our observations. Professor Münsterberg used to exhibit before his students printed words with instantaneous illumination, and found that whenever he spoke a sentence beforehand, he was able to influence the seeing of the word.

For example, one of the printed words he used was "courage"—he would first say something about university life; and the students would read the word "college." Before he tried the printed word "Philistines," he casually said something about colonial policy, and the students then read the word "Philippines."

"About two years ago there was a meeting of a scientific association in Göttingen made up of jurists, psychologists, and physicians — men all well trained in careful observation. Suddenly a clown, in highly colored costume, rushes into the midst of this meeting. He is followed by a negro with a revolver in his hand. In the middle of the hall first one and then the other shouts wild phrases. One falls to the ground and the other on him. Then a pistol shot is heard, — and suddenly both are out of the room.

"All present were taken by surprise; and yet every word and action had been secretly planned and rehearsed beforehand, and photographs had been taken of the whole scene. Every one present was then asked to write down his individual memory of what he had seen.

"Of forty reports handed in, twelve omitted from 40 per cent to 50 per cent of what had taken place, and there were only six among the forty that did not contain positively wrong statements.

"The scientific commission which reported the details of this inquiry came to the general conclusion and statement that the majority of the observers omitted or falsified about half of the processes which occurred completely in their field of vision, and that the judgment of time duration varied between a few seconds and several minutes."

Similar experiments have been made in Berlin by Professor Von Liszt, the famous criminologist, and with similar results.

In the light of these experiments it makes the ordinary lawyer shudder to realize that it is a daily experience in our courts to hear ignorant witnesses detail their memory of occurrences perhaps a year old, and all agreeing with one another in the minute particulars of what they then saw and heard.

How few young advocates realize that if they elicit the same words from several different witnesses in their description of what has come under their observation, with the very same details expressed in the same language, it cannot fail to give any case a machine-made appearance, and however honest upon the merits it may really be the case will never appear so.

This is what is called over-preparation of the case, and is due to "coaching," — a most pernicious as well as unprofessional practice, which can always be avoided by letting the witnesses tell their own stories in their own way.

In preparing any case for trial an advocate should picture to his own mind clearly and fully, so far as possible, the exact circumstances which surrounded the transaction that led up to the litigation.

He should reason out where the mistakes lie, the cause of the misunderstanding between the parties, how it all happened. In this way he can discover how each witness may be corroborated on the important points in his testimony.

The circumstances surrounding a case — the little things grouped together—create the probabilities and the probabilities give color and character to the whole evidence.

I think it was Aristotle who said, "Probability has never been detected bearing false testimony."

An advocate must remember that there are few things that can be proved in court with absolute certainty. Most trials are a battle of probabilities, as it is only the probable truth that he can expect to obtain.

It is essential also that he should know in advance of the trial all the evidence which is unfavorable. It gives him plenty of time to obtain the necessary explanation or nullifying evidence, and will avoid that knock-out blow in a trial which in legal parlance is called "surprise."

If there are any written instruments in connection with his evidence, he should examine these personally. Clients seldom give the language of such papers, but their own construction of them.

There are cases on record where papers have been printed in type which was not even manufactured until years after the date of the instrument. I have heard of an actual case where an important paper was executed in a county which was not even in legal existence until long after the date of the acknowledgment.

In this connection, and as showing the importance of careful preparation, attention is called to the fact that the lives of all great advocates afford abundant evidence

of a faculty for the most industrious investigation in preparing their cases.

General Butler was famous for this branch of his work. He has been reported to have spent many weeks in a workshop studying the details of the machinery about which he was to examine witnesses in court.

Another case is that of an advocate who spent three days in the dirt of a coal mine measuring coal veins and making estimates, in order to explain the matter fully to the jury in a case which he was to try.

My own start in New York was entirely brought about by the careful preparation of a case submitted to me during my apprenticeship in the Corporation Counsel's office. It was an old case which had been in the city law office for many years and was so old that nobody wanted to try it. As I was a newcomer and from another city it was given to me—I have often thought — by way of discouraging me from further efforts to become a trial lawyer.

It was a suit to recover $40,000 from the city for injuries done by water to the foundation of a building on First Avenue in 1854, or thirty years before the case was given to me for investigation.

The plaintiff claimed that the city, in grading a street,

had diverted a natural watercourse on First Avenue, and that the water had burrowed under his building and destroyed it. There was only one witness in the neighborhood who knew anything about the occurrence.

During the thirty years that intervened the whole character of that section of the city had changed; the avenue had been completely built upon and all the old residents had moved away.

As already stated, I had only been in New York a few months and was a very unwelcome visitor at the city corporation law office. I consequently had nothing whatever to do, so I devoted a whole half a year to the preparation of this case, working on it day and night.

At the end of six months, instead of one witness, I had discovered thirty witnesses who knew about this old watercourse. I had had the most elaborate plans of that part of the city made; a model showing the hilly condition of the road in 1830; by removing some of the blocks the grade of the street was shown as it was in 1854, in 1864, and so on; and finally its condition at the time of the trial.

When the case was actually started in court, I was so excited (it being my first opportunity in a New York

court room) that after having examined my first witness I attempted to sit down and (somebody having inadvertently taken away my chair) sat on the floor with a tremendous bump, amid roars of laughter from the jury, the court, and the whole audience.

After the second day of the trial the court impatiently wanted to bring the case to an immediate close, stating that there did not seem to be anything in the city's contention. At the end of five days the presiding justice had become at least patient, by the sixth day interested, and at the end of the tenth day I had won the court, jury, and audience to my side.

The jury were unanimous in my favor within thirty minutes of retiring; whereas, I always understood that the plaintiff had been previously informed by his lawyer, who was then one of the leading practitioners of New York, that his victory was certain.

My success was not because I presented the case well, for I then was inexperienced and knew but little about court work, but the case had been so exhaustively prepared that it almost developed itself during the trial, and when developed, it was impossible to overcome it.

Perhaps many of my readers remember the case of Carlyle W. Harris, who was tried for murder about seventeen years ago, was convicted, and executed. It

was one of the most famous trials of that decade. What is not commonly known, however, is that the case had been abandoned by the District Attorney's office as a "suspicious but hopeless one," when it was handed over to my industrious assistant, Mr. Charles E. Sims, and myself for further investigation. Harris brought about the death of his young wife by the use of morphine, and something of the magnitude of the preparation of that case for trial is shown by the statement that nearly five thousand cases of morphine poisoning were examined before the trial.

It is always dangerous for the advocate to go into court until he has studied the other side of any case he is preparing. He should study his adversary's case almost as carefully as his own. Former Vice-president Schuyler Colfax, in a lecture at Cambridge, Massachusetts, stated that Abraham Lincoln was never once taken by surprise in court for the reason that he always prepared the other side of the case as the best means to ascertain the strength or weakness of his own case. It is seldom that any dispute reaches the stage of litigation unless there are two distinct sides to the question. Once familiar with both sides of the case, the advocate then can select his strong points as against the numerous points which only serve to confuse the strong ones.

He should remember that an ugly point — one which will militate against him — cannot be gotten over by running away from it, he must meet it either before or at the trial. Instead of running away from a difficult point he should try, as one writer says, to prepare himself to run away with it and turn it to his own advantage, if possible.

If the objectionable point is insurmountable, then he should advise his client to compromise; if not, lay his plans to overcome it.

Of course, if cases were prepared here as they are sometimes in Italy, all these suggestions would be unnecessary. For example, I once knew of a case where an American, sojourning in Rome, had taken a great fancy to a painting in the picture store near by his hotel. He went to see it several times and finally asked the price; the price was a large one and he replied that it was too expensive and he did not want it. What was his surprise upon returning to his hotel to find that the picture had been delivered and with it a bill for the price he had been given. He immediately returned the picture with a note that he had not bought it and did not want it, but the shop dealer refused to accept it and brought suit against him for the price named. He engaged an Italian lawyer. At the trial he was

amazed to see witness after witness take the stand and swear that they had been present in the store, had heard him ask the price of the picture, and had heard him order it sent to his hotel. He turned helplessly to his lawyer and said, "What can a foreigner do under such circumstances?" The lawyer blandly replied, "Wait." When the defence opened, an equal number of witnesses took the stand and testified that they too were present in the store, heard the American ask the price, order the picture sent to his hotel, and saw him take out his pocket-book and pay for it!

As the day for trial approaches, then is the time for the advocate's dress rehearsal. Actors rehearse many times every play they are going to produce in public; all race-horses are carefully trained before each race; musicians practise each and every note which they are to perform; athletes are trained to a nicety before each contest; and trial lawyers are no exception to the rule, and should carefully rehearse for a trial, especially if they are beginners.

There is a great difference between "coaching" a witness and preparing him for the witness-stand. If a witness is "coached," he is apt to be led to perjury, but if he is merely prepared, then, in my judgment, the cause of truth is advanced.

Why should a timid, nervous witness be left to the tender mercies of the opposing lawyer without a word of advice? Why should an advocate not caution the self-opinionated, loquacious witness not to make an ass of himself in the witness-box? Sometimes a fortune or a life may depend upon some witness in a very humble station of life, — a servant, a cabman, a night-watchman. Why not call his attention to the manner in which he is going to give his testimony?

There is nothing so annoying as a fool in the witness-box, especially when the examiner knows the man who is making a fool of himself is really telling the literal truth. Why not remind a witness to keep his temper, to speak slowly and distinctly, to be respectful to the court and the opposing lawyer? Why not caution him not to try to be "smart" or flippant in his replies? Why not caution him that he should carefully understand a question before he attempts to answer it; to try to make his answers short and responsive, and not volunteer matters about which he is not questioned.

Why not impress upon him that if he hesitates for an answer and weighs his words, he will detract just so much from what he says and give the appearance of trying to hide something.

Why should not an advocate test his own witnesses by cross-examination? It often relieves their minds very much, because they not infrequently are afraid that when they mount the witness-stand, their whole past will be raked up by the cross-examiner, and this fear often makes them hesitate to tell all they really know.

Such a rehearsal is good for the examining counsel as well. It teaches him how to manage and handle his own witnesses when he reaches the court room, and if he is careful to confine these rehearsals to the manner only and not the matter of the testimony, he will find them of the greatest service at the trial, both to himself as well as the cause he represents.

One more thing remains to be done: The advocate should draw himself an accurate, minute trial brief; it should state first the names of the parties, the court, and nature of the case. It should set out the pleadings; it should give in a narrative form a history of the case, with a general account of what the claim or charge is and what the defence is; it should present in detail the evidence of all of the witnesses; it should give all the gossip of the case, suggestions for cross-examination, and the law applicable, with cases cited. It is often a good plan to have a short summary of the law applying to each particular case ready to be handed to

the trial judge the moment the case is called and before any witnesses are examined.

It is a very different undertaking to prepare a case for trial, and to present it in court, where much of the preparation should properly be discarded, else the minds of the jurors are choked with a mass of immaterial matter. What should be presented to a jury are not the crude materials of preparation, but the results of study; all the weak evidence offered only detracts from the strong points.

An advocate should not forget to have all his witnesses attend the court when the trial opens. It is the greatest mistake to bring them from his office just as he puts them on the witness-stand. If he allows them to sit in the court room and hear the case develop, they become accustomed to their surroundings, and when called to the witness-stand have far more self-possession and make much better witnesses.

THE COURT ROOM

CHAPTER VII

THE COURT ROOM

ARMED with all these preparations it is now safe for the advocate to open the court-room door and walk in.

I wish it were possible for me to take a class of students of advocacy to a court room where I was conducting one of my own trials; there we might sift the case through together, as it were, and I could show them the work of an advocate in action, and explain to them the different situations and the reasons for every move and every play in this wonderful game.

I have often thought that one of the best methods of instruction for students, perhaps in their last year at the law school, would be to take the class in a body to the court-house, where advocates of experience were conducting actual trials, and then return to the lecture room and discuss in detail the trial and the whys and wherefores for every move made by counsel on either side.

Some day perhaps this will be done.

This system of object-lessons or teaching men how to do things is gradually being introduced into some of our larger universities.

At Harvard College, at the present time, where men are being trained for every learned and scientific profession, education is now got by doing the things themselves, and there is a gradual but marked change in the teaching methods.

For instance, at Squam Lake, in New Hampshire, at the Harvard Engineering Camp, there are students who spend two months in the summer living the lives of working engineers.

Harvard also has a preserve at Petersham, New Hampshire, where men studying to be foresters, instead of learning from books, take in hand the actual work. In Vermont, in order that the mining students may perfect themselves, Harvard has control of part of a copper mine, and there the men work as actual miners for eight weeks in each year. Even in the law school the lecture system is being almost abandoned, and every student is now being taught to do many of the things his profession requires.

First of all, let me impress upon the young advocate the importance of his manner in the court room.

Parker, in his "Reminiscences of Rufus Choate,"

graphically describes Rufus Choate's manner in court: "Mr. Choate's appeal to the jury began long before his final argument; it began when he first took his seat before them and looked into their eyes. He generally contrived to get his seat as near them as was convenient, if possible having his table close to the bar, in front of their seats, and separated from them only by a narrow space for passage. There he sat, calm, contemplative, in the midst of occasional noise and confusion solemnly unruffled; always making some little headway either with the jury, the court, or the witness; never doing a single thing which could by possibility lose him favor; ever doing some little thing to win it; smiling benignantly upon the counsel when a good thing was said; smiling sympathizingly upon the jury when any juryman laughed or made an inquiry; wooing them all the time with his magnetic glances as a lover might woo his mistress; seeming to preside over the whole scene with an air of easy superiority; exercising from the very first moment an indefinable sway and influence upon the minds of all before and around him. His manner to the jury was that of a friend, a friend solicitous to help them through their tedious investigation; never that of an expert combatant, intent on victory, and looking upon them as only instruments for its attainment."

While it may be some years before a young advocate can acquire the marvellous self-possession of a Rufus Choate, yet in the meantime he cannot do better than try to make friends with everybody connected with the court room, including the court officers; he will find it a great weapon. A lawyer who has become friendly with all the court attachés starts with no inconsiderable advantage. Their manner toward him is quickly observed by the jury and cannot fail to make an impression upon them, as well as upon his witnesses. The jury somehow feel an advocate's popularity, and they naturally infer from this that he must be candid and open-hearted. He starts well with everybody.

Of course, courtesy to the presiding judge is absolutely essential, and courtesy to the opposing lawyer extremely judicious.

In my judgment, it is the greatest mistake to be constantly making objections to trivial matters and badgering an opponent; the very foible of an antagonist which one may be able to hold up to ridicule may perchance be the pet hobby of some juryman, and you hit him at the same time you smite your opponent.

It is no easy matter to use the weapon of repartee to the liking of all the jurymen. They are quick to take sides with one lawyer or the other, and they are

very apt to choose the under dog. Jurors love courtesy and are instinctively drawn toward the counsel who conducts himself like a gentleman; if an opponent insults an advocate and he does not answer him, — so long as the jury believe that he could if he chose, — they esteem him the higher for not doing so.

When attending the English courts not long ago, I was especially impressed with the great courtesy among the barristers, not only toward the court but toward one another. Once, when the cross-examination became a little tedious, the presiding judge courteously addressed the counsel. "Sir Henry, don't you think you have pretty nearly covered that point — the witness has admitted so and so? Is that not all you want?" To which Sir Henry replied, "Yes, my Lord, but there was another point that I am quite anxious to call your lordship's attention to." And so the examination proceeded as if there had been no interruption.

The same day, when lunching at the Inns of Court, where there were some two hundred Barristers, dressed as men in this country would dress for an afternoon reception, in black coats, silk hats, black ties, and sitting on wooden benches and eating off wooden tables, I inquired as to how this courtesy between counsel

was maintained to such a marked degree, and was informed that the profession would not tolerate anything else; that all Barristers were members of a club, so to speak, and while occasionally there might be more or less of a personal encounter between the opposing Barristers in the court room, the really discourteous ones were very soon "smoked out" and made to feel their unpopularity; the rules compelling universal courtesy toward one another both in and out of court.

In fact, in all countries, the higher one rises at the Bar, the less is he apt to indulge in little quibbling demands and differences.

An advocate should remember that there is nothing so dangerous as to try to be "smart" or tricky in a court room, and no matter how impatient the judge may become, or how hard may be an advocate's struggle with what turns out to be a hopeless case, he should always keep his temper. It is quite possible to be a good advocate and at the same time a gentleman.

Another hint as to manner in court. In my own practice, especially when I felt I had a good case, I have often found it an advantage to my client if I kept very quiet during the first part of the case — I make no objections to evidence or to any procedure of my opponent; I am apparently attentive, but not keen.

The jury begin to wonder what I am there for and become curious to hear my voice, and if I have anything to say or if I know how to say it. They begin to pity my client for not having secured a better talker. My opponent seems to be having his own way in everything. If I do perchance say anything that seems worth while, they prick up their ears and look surprised. Gradually they magnify the importance of any little remark I make, and finally realizing that my client is really being represented, they all suddenly flop over to my side of the case.

ART IN SELECTING THE JURY

CHAPTER VIII

ART IN SELECTING THE JURY

BEFORE the trial actually begins perhaps the most important part of an advocate's whole work is the selection of his jury. This I have always considered one of the fine arts of trial work.

Indeed how could anything be more important than the selection of the men who are to decide the case? It matters not how thorough one may have been in preparation; it matters not how good a case one may have — unless he selects the proper kind of men to decide it, he is bound to have a mistrial or a defeat.

It was not until the latter part of the sixteenth century that jurors in England began to assert themselves, and to decide cases according to their own consciences rather than in obedience to the directions of the court.

This assertion of their independence gave rise to many interesting encounters between the judges and juries after verdicts had been rendered contrary to the court's personal convictions. The judges would refuse to accept such verdicts; would sometimes try to coerce

a jury to alter the verdict by locking them up without food, drink, or tobacco, and in some instances actually imprisoning the jurors and subjecting them to individual fines sometimes as much as £1000.

It has often been said that possibly the one and only thing the Almighty does not know is what the verdict of a petit jury will be.

In my own judgment there is no better way to study a jury than to serve on one, and I have often thought that any man who is going to become an advocate could wisely serve many terms as a juror before he is admitted to the Bar and thus becomes disqualified. In any event it is a wise practice for beginners to talk with their jurymen after their cases have been decided, and thus learn, by experience, the juryman's point of view of a case.

I think it would amaze the inexperienced trial lawyer if he could overhear the deliberations of the jurors before whom he has presented his facts.

Many years ago when I was serving my apprenticeship in the Corporation Counsel's office and defending the city of New York in the ordinary damage cases that are heard before juries, the then Clerk of the old Superior Court, Mr. Boesè, used to take me into his private office, where, because of the peculiar construc-

tion of the large court-house windows, it was possible to hear the deliberations of the jury in the room above. It was because of my semi-official position that I was accorded this privilege and it was a great education.

I shall never forget the warning Mr. Boesè gave me the first time I was accorded this privilege. He told me an anecdote about a leading trial lawyer who happened to come into his office after the trial of a very important case which he had just finished. The jury had gone out and were at the time deliberating in the room above. Mr. Boesè asked his friend if he would like to listen for a moment to the deliberation of his jury. The lawyer stepped over to the window. Pretty soon some juryman exclaimed, "I tell you that lawyer for the plaintiff is a smart man." Whereupon, he turned to Mr. Boesè with a smile on his face and remarked that the experience was not only instructive but rather pleasant. A moment later another juryman shouted out: "What did you say about the plaintiff's lawyer — did you say he was smart? Well, I don't know so much about that, but he thinks he's smart, that's certain."

Once when I was in the same room, listening to one of my juries while they discussed a case I had just finished, where a lady had fallen on a sidewalk and had

sued the city for personal injuries resulting from her fall, I heard the foreman start the discussion by saying, "Now, gentlemen, before we consider the evidence there are some important questions of law for us to decide." Whereupon a loud voice called out, "Oh! to hell with the law. How much will we give the girl!"

But what of the lawyers who selected the jury in a case tried in the New York Supreme Court last spring? They returned a verdict for plaintiff for $10,000. The trial judge set the verdict aside as against the evidence and founded upon perjury. The next day all plaintiff's witnesses were indicted by the grand jury for perjury. The lawyers for the defendant sought an interview with some of the jurors to ascertain how they came to such a verdict. This was the juror's reply: "We didn't believe the witnesses on *either* side, so we made up our minds to disregard all the evidence and *decide the case on the merits.*"

At the present time in New York County the lawyers are allowed six peremptory challenges in an ordinary civil case and are allowed to examine each juror with considerable latitude.

I am bound to say that in my judgment the method of selecting a jury in vogue at the present time in our New York County courts and the class of men that are

empanelled to serve upon our juries are far superior to any other locality or tribunal that I am acquainted with.

In Massachusetts, for instance, the lawyers are not allowed to put any questions at all to the jury excepting those that are first submitted to the judge, who, himself, repeats them to the jury if he thinks they are proper questions. The result is that the lawyers have to rely entirely upon the personal appearance of the jurors and upon their examination of the jury list before the term opens.

In Massachusetts the terms are for three months and the list of the jurors is given out to the lawyers two or three weeks in advance. Any one having an important case in that term usually has the whole list of jurors looked up by some detective agency.

Something similar to this method is employed in Canada, where no questions are allowed to be put to the jurors by the counsel, excepting where there is a challenge for cause; that is, where there is some reason for suspecting that a juror has already formed or expressed an opinion in the case or has some pronounced prejudice against one side or the other. Questions are then allowed to be put to the challenged juror, and two other members of the same panel are selected by the trial

judge to decide the question as to the juror's prejudice; these two jurors retire and bring back their verdict, which is final.

This, to my mind, is an absurd practice and leads to the pernicious habit of having the whole panel of jurors investigated by the various litigants or their representatives before the term of court opens.

Even in our own Federal Courts, where there are only three peremptory challenges, the judges restrict the examination of jurors to a few pertinent questions. It must be remembered, however, that in our United States courts the jurors are all selected, the names are taken from the City Directory according to the nature and location of their business, and while in this way a more educated class of jurors is perhaps obtained, yet I doubt very much if the verdicts are as satisfactory on the whole as those rendered by the class of men that are selected for service in our State Courts, where the jurors are summoned from all stations in life with a reasonable view to intelligence and business occupation, and who, therefore, fairly represent the average intelligence of our great middle class.

Let us imagine an advocate selecting a jury in one of our State Courts. He should keep in mind that in order to win he must persuade each one of the twelve

to his view of the case — as Rufus Choate once cleverly put it: "Jurors are like twelve human dice which must all turn up one way or there is no verdict."

An advocate must remember that jurymen are all human; they carry their prejudices into the jury-box just as surely as they carry their arms and legs. Some are hardened by their own ill luck and consequent contempt for their fellow-men, and have a natural dislike to see anybody succeed in life; some are entirely lacking in that important factor in a man's make-up, which is called the "milk of human kindness"; others are generous, humane, open hearted, open minded; some are intelligent, others stupid. Over there is a little man, his disposition is narrow, he shows in his face that he is self-opinionated and difficult to persuade, the world has used him ill; behind him sits a man with no opinion on any subject, willing to go with the majority on whichever side it may be; yonder is a hard, grim-faced man with cold, gray eyes. Do you want any of them? Which ones do you want, always keeping in mind the side of the case on which you appear and the nature of the case which you are about to try?

Laboring men prefer their own kind. Each nationality will to some degree stand together. If the advocate is for the plaintiff, he wants to avoid the cold-blooded,

narrow-minded, narrow-hearted types; he wants to select young men with warm natures and intelligent faces. One can often read a man's character in his face, especially after middle life, although it should never be forgotten that an intelligent exterior sometimes conceals a very shallow mind.

He should remember that a jury of landlords will deal unjustly with tenants. Farmers will invariably side with farmers. Railroad men have a natural prejudice against those who attack railroads. On the other hand, a dislike of great corporations makes a good plaintiff's juror. Many a builder or expert mechanic has changed the whole twelve by knowing the case and explaining his version of it to his fellow-jurors.

These are all distinctions that are so simple and plain that even mention of them seems unnecessary, were it not that they are overlooked every day in our courts, and as a result mistrials follow. Only the other day I saw a case being tried for the third time. There had been two disagreements, although the plaintiff was represented by a lawyer in middle life and of excellent reputation at the Bar. It was an ordinary accident case brought for injuries received in an elevator situated in the *Presbyterian* Publishing Company's building.

The sole reason of the third disagreement of the jury was because the plaintiff's lawyer had inadvertently allowed to remain on the panel two stubborn Scotch *Presbyterians* who held out all night for the defendant against the other ten. Before such men the plaintiff's case was lost from the very start.

I advise an advocate, therefore, to scrutinize his jurymen from the moment their names are called. He should watch the way they take their seats in the box. This may be the only chance he has to observe the juryman in action. The way he folds his coat, or brushes by the other jurymen in the box may give the advocate some hint of his character and habits, and disclose to him whether he is courteous, methodical, or otherwise. Sherlock Holmes claimed he could tell a man's occupation if he could watch him walk across the floor.

Only a short time ago I observed a young lawyer who represented a railroad corporation examining his papers while the jury was filing into the box. His railroad was being sued by a plaintiff who had lost a leg in a collision, and a juror walked into the jury-box limping, and was about to be accepted by this young attorney when his associate discovered that this very juror, himself suffering from an injured leg, had received his injuries in another railroad accident; obviously here would have

been a juror no railroad company could ever have gotten over to its side.

The advocate should keep his eye ever on his jury (the eye is as eloquent and attractive as the tongue), and yet it should not be done offensively, nor as if it was a matter of too great importance. Nothing should escape him, however, — neither a question of the adversary nor an answer by a juror. He should mark their employments, their methods of earning a living, their social positions, their age; should talk to them about the case, note carefully their answers, as these may disclose bias, and certainly will disclose their intelligence.

Oftentimes when questioning a juror, he will answer "yes" or "no," which answer really conveys no impression to the mind. He should be asked respectfully to tell what he means by "yes." This will show his intelligence and perhaps disclose a bias.

The very least expression of doubt is all that can be expected to be gotten from him. No juror will come out flat footed with his prejudice. He always qualifies it by saying he would "abide by the evidence and take his law from the court," but he won't; and if an examiner is satisfied with this kind of an answer, his work is sure to be poorly done.

Jurors are extremely slow to admit prejudice; and they should be encouraged by little pleasantries. I have often tried it with success; a juror is easily led to admit his bias or sympathy during a laugh.

The advocate should always examine the jurors himself, should try to get acquainted with them; he can often in this way tell whether he and they will get on together. It becomes a sort of second sight.

The value of getting acquainted with the jurymen is never more apparent than where, in some official capacity, one finds himself trying a succession of cases before the same panel of jurors. In the District Attorney's office we always used to save our most important cases for the second week of the term. I have found that after I had been continuously in court, in successive cases, and before the same panel of jurors, it gradually became almost a hopeless task for my opponent to try to beat me. This is especially the case in the Criminal Courts, where the personal equation of the Prosecuting Attorney plays such an important part with the jury.

Not long ago, in the Federal Courts, I challenged, peremptorily, a most intelligent-looking man. He hung around the court room all the morning session and came up to me about one o'clock and asked me apologeti-

cally if I would mind telling him why I had dismissed him from the jury. I replied pleasantly, "I have not the slightest idea, except that while we were talking together, I had a sort of a feeling that you and I would not get on." Whereupon he replied: "You were absolutely right. I never knew you, but I have a deep-seated prejudice against you and I would never give your side a verdict in any case."

Upon further inquiry, it turned out that he had been interested in a trial I had conducted some ten or fifteen years before, where he thought, from the newspaper accounts of the trial, that a criminal whom I had convicted ought to have been acquitted.

In examining the jury it is often well to take four at a time, — they usually sit in banks of four in the jury-box, and one often encourages the other to answer freely; in this way the advocate gets their faces and their answers in contrast better than when he examines them one by one.

Sometimes I make some pleasant little joke or courteous retort to the opposing lawyer, and at the same time watch closely the faces of the jury as I do so; some smile, others frown — it helps me to decide which ones I like and want. It is a maxim that a man shows his faults when he laughs, and on the other hand, rather

a dull face will oftentimes light up with charm and intelligence if it breaks into a smile.

It is well to give the jury an idea of what the trial is about so that one can get their minds running upon the kind of a case they are to listen to, and if the advocate is representing the defendant, he has the best possible opportunity to get before them his defence, and make them realize that there are two sides to the controversy.

Jurors ordinarily don't know what the defence is until the counsel for the defendant opens his side of the case.

It has long been my theory that as soon as the plaintiff's counsel has explained his side of the case and before any evidence has been introduced, defendant's counsel ought to be given an opportunity to open his case, and tell what the defence is, so that the jury can realize what the issue is from the very start.

This, however, is not the practice of our courts, and unless, when appearing for the defence, the advocate takes the opportunity to let the jury know that there is a defence, and what it is, while he is examining them, they are apt not to hold their minds in abeyance while listening to the plaintiff's witnesses, and frequently get their opinions set while listening to the plaintiff's case, thereby making it very difficult to dislodge the impressions thus once formed.

Jurors also can understand the cross-examination better if they know the defence beforehand, and can appreciate what the advocate is driving at by his cross questions.

Ofttimes the law in favor of a defendant seems harsh to a layman. Whether this is so or not a trial lawyer can frequently discover by framing a question in this wise: "Supposing the judge should charge you that the law in this case is so and so, would you accept it and decide the case accordingly; or would you form your own opinion and follow what you thought the law ought to be." Many a juror will frankly say that he would abide by his own opinion, if the question is put in this way. Whereas, if the question is put as most lawyers put it, "Would you take the law from the court and the evidence from the witnesses," the juror will always nod his head and nothing has been accomplished by the question.

If in answer to the question I have suggested the juror shows the slightest hesitation or doubt, the examiner should not want him. How absurd it is to examine a jury in the manner we hear employed every day in our courts. "Do you know of any reason why you cannot decide this case according to the law and the evidence." "If you think we are entitled to the

money, will you give it to us?" "Do you know of any reason why you cannot try this case as an impartial juror?" Such questions elicit nothing but nods or shakes of the head, and no light is thrown on the subject.

An advocate should keep in mind that he has only six challenges; and should not use them all before his opponent has exhausted his.

I usually challenge two or three jurors right away, and my opponent, therefore, never suspects me of sparring with him on the question of challenges, and goes ahead and exhausts his six while I have three to the good, and then I have the selection of the jury in my own hands.

It is often well to examine as to the class of witnesses one is expecting to call. Many jurors have prejudices against experts. One nationality is prejudiced against another. The Irish are often prejudiced against Hebrews, and *vice versa*.

Germans are stubborn, but generous. Hebrews, as a rule, make fine jurors, except where they are prejudiced. Young men are much safer than old men, unless the advocate is for the defendant, when he wants older men.

If for the plaintiff, an advocate should remember

that he must win the twelve; if for the defendant, he needs only one.

If he is defending in a criminal case, he needs all kinds of men on his jury, old and young, rich and poor, intelligent and stupid, a German, an Irishman, a Jew, a Southerner, and a Yankee. He should mix them up all he can and let them fight it out among themselves and *agree if they can.*

There never was a greater error committed in the choice of a jury than in the recent trial of Captain Hains at Flushing. Captain Hains was being tried for aiding and abetting the murder of a man who had seduced his brother's wife. The Prosecuting Attorney allowed to remain on that jury a half-breed Indian who had been North from his home in Texas only six months. This Indian would never have voted for conviction in such a case, and as it turned out he became spokesman for the jury, and after laboring with them for twenty-four hours succeeded in bringing them all to a verdict of acquittal. This acquittal, in the opinion of many lawyers who followed the trial, was one of the most startling verdicts we have had in any important case in this state for years, and yet from the moment the Indian juror was accepted by the District Attorney all possibility of a conviction was at an end.

An advocate should not smile and nod at his jury all the time, as so many of our lawyers do. It always seemed to me that it must be most offensive to the class of men he expects or wants to decide with him. He should treat them throughout as business men, not as curiosities. He should not flatter them; flattery never fails to fall flat.

How often we hear the inexperienced lawyer exclaim, "What is the use of that kind of evidence before honest men like these in the jury-box?" If the juror is honest, he does not like to be called so in a court room. On the other hand, there is an ingenious way of flattering a jury which wins them without their knowing it.

I recommend the utmost courtesy toward them, the keenest attention to their questions, their comfort, their ability to hear the evidence, a courteous salute to them as a body of men, not as individuals, at the opening of court.

If the advocate himself believes in jury trials, the jury somehow realize that he trusts them and they like it and they try to live up to his confidence in them as a tribunal, and they come to like him because he likes them.

Many of these suggestions may seem almost trifling, but they are essential to success in jury work.

Michael Angelo was finishing a statue when a friend called and remarked that the sculptor had done but little upon the statue since his friend had been there a few days before.

"Oh! yes, I have," said the sculptor; "I have given a little more symmetry to the arm, a little more expression to the mouth, a little more beauty to the eyes."

"But," said the friend, "these are mere trifles."

"Ah!" replied Angelo, "that is true; but remember, trifles make perfection and perfection is no trifle."

During the course of a trial an advocate often discovers that some juror is against his side of the case. He should be careful not to antagonize him; for he needs all twelve jurymen to win. He should be patient, and watch for a chance to win him over. If the juror asks a question of a witness, the examiner should not treat it as absurd or immaterial, however much it may be both. He should humor him and get the witness to explain any unimportant point to him if he wants it so, and try to remove his erroneous impression. He should win him back to his side of the case by degrees and by personal consideration. He should realize that this juror at least is against him, and that he needs him and should make up his mind to win him.

Why not flatter him a little by some such suggestion

to a witness as "please repeat that remark so that the tenth man can hear you." He feels his importance, and believes the advocate does, and likes it. Perhaps the lawyer on the other side, feeling sure of him, ignores him, and this begins to pique him.

I have suggested watching the jurors as they go into the box and as they are being selected. I repeat that an advocate should watch them closely all the time, — watch them as the evidence is being introduced and as the case progresses, for in this way he will know better how to deal with them, for he can readily make up his mind which ones will lead the others and consequently to whom he wants particularly to address himself.

In closing this chapter I recall an instance of how little the best of advocates knows about jurors, however close attention is paid to them.

Some years ago William M. Evarts had been retained by the government to prosecute in the ribbon fraud cases, where the government had been defrauded out of duties to the amount of many millions of dollars by the importers of ribbons. One case was being tried as a test case. After a long trial, the jury having been out all night, Evarts learned from a court officer that the jury were going to announce their inability to agree, and stood eleven to one. At the opening of court the jury

was seated and Evarts rose, addressed the court, and said that this was a very important case to the government; that he was informed the jury had disagreed and stood eleven to one; that it was a case where all the importers of ribbons in the city were interested and it was evident that the jury had been tampered with and that the defendants had succeeded in reaching one juror, and he thought it was the duty of the court to make inquiries of the jury before dismissing them and ascertain the name and address of the delinquent juror. With this the foreman of the jury arose and said: "If your Honor please, I was the delinquent juryman. I held out all night for a verdict of conviction, but *the other eleven men wanted to acquit.*"

"OPENING" TO THE JURY

CHAPTER IX

"OPENING" TO THE JURY

THE great importance of preparation for the trial and the selection of the jury, as the first two steps in trial work, should not be lost sight of as we progress further into the difficulties and delights of a jury trial and begin to discuss the opening speech to the jury.

If an advocate appears for the plaintiff in a case, he should remember that he usually has the wonderful advantage of the first and last word — the opening and closing speech.

He should see to it that he does not miss his opportunity, for it has often been said that "*a case well opened is already half won.*" At the same time there is, perhaps, nothing more difficult in the art of advocacy than to effectively open a case to a jury.

Justice Miller of the United States Supreme Court regards the opening statement as of greater importance than the closing argument, and Judge Dillon — perhaps the oldest lawyer in active practice at our own Bar, allows himself to be quoted as of the opinion that

"not one lawyer in twenty can state a case neatly, logically, and compactly." This assertion seems to be borne out by the fact that, nowadays, we so seldom see it really well done.

In an opening speech one has the opportunity of creating, at the very threshold of the trial, a favorable opinion of his case. If the advocate interests his jurymen in his behalf at the very beginning, they will often retain throughout an unconscious bias in favor of his side and want to see him win.

As a matter of fact jurors usually forget the real parties in interest and take sides with the respective lawyers representing them.

The experienced lawyer tries to lead the jury to concentrate their thought and interest upon seeing him win; — and he can make good headway toward this result by his opening speech.

As a general rule the case should be opened in a calm, deliberate, and dignified manner, and should be as brief as the facts will permit.

The facts should be stated in clear, concise language without argument, eloquence, embellishment, or feeling.

When addressing a jury, a lawyer should always express himself in the language of everyday life and use only the purest, simplest English at his command.

Simplicity by no means requires that his statement should be dull; on the contrary the brighter and more vivacious the language, the more graphic the description, the keener the attention of his hearers is sure to be. He should try to paint on the mind of each juror a clear, vivid image of the persons, places, and events he is calling to their attention.

Quintilian says, "If you try every department of eloquence, you will find nothing more difficult than to say what every one, when he has heard it, thinks he himself would have said, had the opportunity been his, and for this reason he does not contemplate it as said with ability, but with truth."

The facts should be so stated that they seem naturally and almost as a matter of course to entitle the advocate's client to a verdict. And while, as already stated, he should be brief in the statement of his case, yet it must not be a mere outline. His statement should be full enough to inform his jury of every important factor in his case; though too much detail is a great mistake, as it draws their attention from the main issues, and only befogs them, while at the same time it leaves nothing new to arouse and hold their interest in the testimony during the progress of the trial.

An advocate should begin by introducing to the jury

the parties to the litigation: "In this case, gentlemen of the jury, the plaintiff is a merchant by the name of John Doe. He brings suit against Richard Roe to recover on an oral agreement entered into between the parties for the purchase and sale of some mining properties situated in the Cerro de Pasco region of Peru. The facts in the case are these, etc."

He should never use the words — now so much in vogue, "we expect to prove" or "we expect to show you;" such expressions throw doubt at once upon the merits of the case.

He should always say, "Gentlemen, the facts in the case are these" — then proceed to narrate the circumstances that led up to the controversy; then the nature of the controversy itself. He should make his statement in narrative form. Keep dates and events in logical order, always remembering that "clearness is eloquence," and if he makes his statement of facts attractive, he rivets the attention of his hearers.

He should never appear to have too strong a case or boast of it in advance. I once saw a crowd of young lawyers at the court recess around an old experienced lawyer, congratulating him upon the wonderful opening his junior had just made in a case in an adjoining court room. "Yes," replied the veteran, sarcastically,

"he opened the case so wide that 'all hell' couldn't close it!"

There is a fine art in never overstating a case; for if the evidence turns out to be stronger than the statement, the advocate is sure to secure credit for his candor and modesty.

He should avoid, therefore, all exaggerations. Facts should expand on the trial rather than diminish in force.

It is a very common practice to take the story of each witness separately and rehearse it to the jury. I have always regarded this as poor practice and have adopted the method of opening the case in its entirety without reference to any particular witness, so as not to rob the jury of the excitement of seeing the case unravel itself as the various witnesses tell their individual stories. This gives the case to the jury piecemeal and, as I have already indicated, has the important effect of keeping up their interest.

Of course there are some cases when it is better to concede frankly on the opening the weakness of the reputation of some particular witness. There is a double purpose in this. It robs the adversary of one of his strongest weapons by making the admission in the first instance and at the same time it gives an opportunity to point out in advance how it is proposed to corrob-

orate the testimony of such a witness by other evidence coming from trustworthy sources.

An advocate should never argue in his opening; there is nothing yet to argue.

He should reserve his energies for his closing argument. "Too much emotion, too much anxiety, too much elaboration, too much effort" in his opening "are only calculated to damage his cause" by creating a suspicion that even in his own mind his case is not quite so good as it might be.

He should use only temperate language in his opening speech. He should not try to arouse any prejudice at the start, by any excess of zeal or use of invective. He comes to court to right a wrong, not to revenge it. After his evidence has justified it, then will be the appropriate time to indulge in invective or terms of reproach.

Any display of eloquence or attempt at a peroration at the close of an opening speech is altogether out of place and extremely bad taste.

An advocate should stop when he feels that he has made the jury fully understand his case, and when he feels that if he proves the facts as narrated by him, they cannot fail to give him a verdict.

ART IN DIRECT EXAMINATION

CHAPTER X

ART IN DIRECT EXAMINATION

As to the examination-in-chief of the advocate's own witnesses, of course it is impossible within the limits of one chapter to give a systematic and scientific exposition of the entire subject. We must assume, therefore, that the advocate has become entirely familiar with the rules of evidence before entering upon the trial, and I must content myself with indicating some of the arts employed by great advocates and making a few suggestions which my experience has impressed upon me as important to be kept in mind when conducting the examination-in-chief.

The impression prevails quite generally in the profession that the direct examination of witnesses requires far less skill than the cross-examination.

I am inclined not to agree with this view, and it is a matter of regret that so little attention is paid to the examination-in-chief, while many arts are exercised to produce effects in cross-examination.

I presume this is owing largely to the fact that cross-examination is so much more engaging to the spectators

and its results are so much more quickly perceived by them.

The subtle arts and consummate skill of an examination-in-chief are seldom apparent to the mere spectator, however it may be appreciated by the lawyers engaged in the case, who may be able to recognize with what ingenuity and tact the desired facts have been elicited and the weak points suppressed or at least not clearly revealed.

Is it not far easier to propound cross-questions which will put a man in an unattractive position before an audience than to so conduct his direct examination as to make him show himself to the greatest possible advantage?

Many an idle boy has broken painted windows, but no one but an Albert Dürer could have made them!

If the direct examination is properly and skilfully conducted, the impression thus made by an honest witness is more lasting than any argument of counsel. The vivid story of a single witness told in a winning way will leave a first impression upon a juror's mind that no eloquence can efface.

It is no easy matter for an advocate to get his own evidence properly before a court and jury.

It is an important fact for him to remember that cases

are often won or lost by the straightforward statements of the parties themselves, and the natural homely way they sometimes have of putting things.

A builder was suing for extra work done on a dwelling. The defence was that everything had been paid for as originally contracted, but that much of the work had not been done according to agreement. An expert was called as defendant's witness. He testified that the house was six inches lower than called for by the specification; that the windows were on weights instead of opening out like French windows on hinges, and that there were other material defects in workmanship. Item by item had to be carefully scrutinized. There was a chimney too short, a cornice defective, etc. The jurors were much worried and confused. Finally, defendant herself, an illiterate woman, took the witness-stand in her own behalf. She knew nothing of books or architecture or plans, but "she was sure the plaintiff had made the house entirely contrary to his bargain, for he promised that the windows should reach clear to the floor. She remembered telling the plaintiff, Mr. Walker, so, and explaining to him that if they had a death in the family and wanted to take a coffin out on the porch, French windows would open like a door and let it out without cramping it in a narrow hall and bruising the edges of the

coffin all up." This graphic description settled the question with the jury, and the woman went away happy.[1]

One more instance will suffice to fix this important fact in the mind, and these anecdotes will serve not only as illustrations, but give a little refreshment from the more tiresome rules and suggestions for the advocate's work.

A German had fitted up a fine barber-shop with mahogany sideboards, gilded mirrors, etc., and a tenant just above him had let the water-basin run over during the night, causing the plaster to drop and spatter all over the new furniture in the barber-shop below.

When told about it, the tenant made light of it, and when asked to make it good, he replied, "Oh, you go to hell." Therefore the barber brought suit in a justice's court before a jury. On the trial the barber was the only witness in his own behalf and stated to the jury with great candor what had been said by the tenant. When the lawyer prompted him by asking, "and what did *you* say?" he replied, "*I said, I vill not go to hell, I vill go to law,*" and then rising to his feet he said, "*und, shentlemen, dot vas schust so bad as to go to hell.*" He won a fine verdict by saying the right thing in the right way.[2]

[1] Donovan's "Modern Jury Trials." [2] *Ibid.*

One of the first objects in the examination of witnesses, both on direct and cross, should be brevity. By his opening speech the advocate has clearly defined the issues between himself and his opponent. In his examination of the witnesses it should be his effort to adhere as closely as possible to these issues.

It is in this part of his work that the superior talent of the good trial lawyer in modern times is the most strikingly displayed. Cases take entirely too long to try, and the issues thereby get needlessly confused.

Modern trials should be conducted more as a matter of business, the one object being to ascertain the truth of the matter in controversy and in the shortest time possible, and not to display the talents of the lawyers on one side or the other.

The advocate should select and arrange his evidence so that the development of his case will be interesting to his hearers. He should strive to keep the jury ever alert. He should remember that nowadays cases are practically won as they go along and not by the arguments of counsel after the testimony is completed.

There is a great fascination for jurors in a well-planned trial that leads them to constant discovery of new facts as if they were developed almost unawares.

The jury should be made to feel that the advocate at least believes in his own case.

He should speak clearly and distinctly, mindful that he is engaged in a matter of importance and let his art conceal art.

I am inclined to put clearness, simplicity, and brevity before everything else in the conduct of a case in court, including the examinations of witnesses and the attempt to keep the salient facts ever prominent before the jury.

An advocate should always use the simplest language possible. It is better understood both by his witnesses and his jury.

He should preserve ever a calm, cool, deliberate, self-possessed, dignified demeanor. Calmness is shown by not growing petulant over little defects, in a kindly and courteous behavior toward witnesses, and in a quiet dignity which gives the idea of reserve force.

Any nervousness or petulance is immediately noticed by the jury and is apt to embarrass and disquiet his witness as well.

He should convey to his witness the impression that he is strong enough to prevent him from stumbling or falling. This confidence is created by the manner and demeanor of the advocate, by the form in which he frames his questions, and the manner in which he asks them.

One mind communicates to another its feelings and emotions, and there is without doubt a well-defined wireless telegraphy going on all the time between a skilful examiner and his witness.

The very first thing that should be done is to put his witness at ease. If he wants to realize the embarrassment of a witness as he mounts the witness-stand, let an advocate step up there (in imagination) for a moment himself, sit down, and look into the "sea of upturned faces," — the three or four hundred strange eyes, eager with curiosity, that are gazing into his own.

Few witnesses can fail to experience embarrassment, even trepidation, under such circumstances; and at the start it is extremely difficult for them to collect their thoughts and give their evidence in a natural way and not become confused and contradict themselves.

What wonder that a witness, however truthful and intelligent, should take the oath as a witness with trepidation, akin to fear, — especially when he discovers the opposing counsel ready to cross-examine him as a hostile witness and turn his evidence to ridicule, if possible, or to his own discredit.

A man who had presided over many trials, Chief Justice Burke, having been summoned as a witness, said to one of his friends: "The character of a witness is new

to me, Philips; I am familiar with nothing here. The matter on which I came is most important; I need all my self-possession, and yet I protest to you I have only one idea, and that is, *Lord Brougham cross-examining me.*"

Many may remember the almost historic reply of Henry Ward Beecher in the Tilden-Beecher case when William Fullerton, who was cross-examining him, shouted at him, "Why don't you answer my question?" "*Because I am afraid of you,*" replied Beecher.

How can the advocate best overcome this embarrassment on the part of his witnesses?

Each witness should be properly introduced to the jury. It is during this introduction that the witness can be made to feel the gentle hand on the rein.

A few simple, unimportant questions should be put in a modulated, reassuring tone of voice. The witness sees that the advocate is at his ease and takes courage.

"You said your name was Jone Doe — I believe?

"You live on 14th Street, do you not?

"What number, if you please?"

This is simple enough, and the witness, almost without any thought, replies, "No. 314."

Q. "How long have you lived in the one house?"

A. "Fifteen years."

Q. "And with your wife and children?"

A. "Yes."

Q. "You are in the manufacturing business, I believe?"

A. "Yes."

Q. "What position do you hold?"

A. "General manager."

Q. "How long have you been employed there?"

A. "Twenty years."

Q. "Then you must have started as an apprentice?"

A. "I did, at the work-bench."

Q. "And were gradually promoted?"

A. "Yes — I became foreman of the shop, and then superintendent of the factory."

The witness is at ease. Even rather proud of himself. The jury think well of him. The advocate can now safely proceed to the important work he has in hand.

Contrast this style of examination with the less orderly system which is so prevalent in our courts.

Examiner (in loud, harsh voice). "What is your name, Madam?"

Witness (timidly). "Mary Jones."

Lawyer. "Can't hear you, please speak louder."

Court interferes. "Madam, you must speak loud enough for that gentleman over there (pointing to the twelfth juror) to hear you."

(Witness looks at the twelve staring men and becomes even more embarrassed.)

Lawyer. "Where do you reside?"

(Witness doesn't "*reside*" anywhere that she knows of. So the court helps out with the suggestion, "Ask her where she *lives*."

Witness (almost inaudibly). "14th Street."

Lawyer. "Please speak up."

(Court officer now takes a hand and shouts in her ear, "Speak louder, Madam.")

Lawyer. "Do you live on the East Side?"

Witness (embarrassed). Nods her head.

Now the *stenographer can't hear her or see the nod*, so he addresses her and asks her to *please speak her answers* as he is writing and can't see her if she shakes her head.

This completes the confusion of the witness for she suddenly realizes that everything she says and even every nod of her head is being *recorded* by somebody.

Lawyer. "Are you acquainted with the *plaintiff?*"

(Witness hesitates and can't answer. She has never been in court before and doesn't know plaintiff from defendant, even if she was "*acquainted*" with either one of them.)

Lawyer (with a ray of intelligence). "Do you *know*

your next-door neighbor, Mrs. Smith, who is sitting at the table by my side?"

This elicits a ready "Yes, sir."

Then the counsel dives right at the *heart of his case.*

Q. "Do you remember the 5th of November, 1905?"

This completely upsets the witness. She cannot, in all probability, even remember the day of the month she is testifying in, much less the 5th of November, 1905, though she may remember all about the occurrences of that day.

If trying to get at the date of her birth, the lawyer might just as well ask her, "Do you remember the 5th of June, 1875?" (the day she was born), and yet this inquiry of a witness, whether she remembers a certain day, is one of the most common of the many errors committed almost daily in our courts.

By this time our lady witness under such a style of examination has become completely discredited with the jury by her apparent stupidity, and little credit will be given to anything she may afterwards say. And all through the fault of the lawyer conducting her examination.

Imagine this same witness taken in hand by an experienced advocate, and again note the contrast.

This time the advocate takes his stand at the further end of the jury-box. The witness, answering from such

a distance, naturally raises her voice without having her attention distracted by a command to do so.

Q. "I believe you said your name was Mary Jones?"

A. "Yes, sir."

Q. "And you live at No. 16 East 14th Street?"

A. "Yes, sir."

Q. "How long have you known this lady sitting by my side, Mrs. Smith, the plaintiff in the case?"

A. The answer comes readily enough — "Some ten years."

Q. "Do you remember some years ago being at her house when there was a conversation about an accident that had occurred the night before, in front of her house?"

A. "Yes."

Q. "I don't suppose you remember the date of that conversation, but can you remember about what year it was?"

A. The witness answers naturally, "About three years ago."

Q. "And in the fall of the year?"

A. "Yes."

Q. "Who was there besides yourself" — and the witness will now, likely enough, go on and remember minutely the whole occurrence.

Such questions as these would now naturally follow: —

"State to the jury what occurred?" "State what next occurred?" "What was said, if anything?" "What was done?" "Go on and tell the jury in your own words what happened in your presence?"

As soon as the witness gets thoroughly at ease and started, the fewer interruptions, the better. He should be permitted to tell his own story as far as possible, but the advocate should always register in his own mind the important facts and see that they are all clearly brought out.

Thus it can readily be seen how his thorough preparation for trial and his intimate knowledge of his case and of his witnesses, which we have already discussed, will now come to his assistance.

The advocate should always be on the alert to restrain his own witness if he wanders from his subject, and not wait for him to be rebuked by the court, for this may entirely disconcert his witness. If, however, such rebuke comes, as it not infrequently does, a few simple commonplace questions will allow him to recover from his embarrassment and continue with his story.

The advocate should avoid technical terms, as well as long, fine, or high-sounding words. These only con-

fuse the witness and distract the attention of the jury from the story he is wresting from the witness.

The more neatly a question is put, the better, for it has to be understood not only by the witness but by the jury as well.

It will be necessary for the advocate to train himself to handle his own witnesses of various kinds, such as the stupid witness, the diffident witness, and, hardest of all, the over-zealous one, the witness who insists upon proving too much. Here is a type of man he is bound to hold in check. He should never let him tell his own story, for the witness will thereby usually prepare himself for slaughter at the hands of the cross-examiner. The effort should be to keep such a witness well to the point and compel him to answer only such questions as are asked. An old lawyer's advice in regard to this kind of a witness is to "get rid of him as soon as possible."

A stupid witness will require all an advocate's patience and good temper.

Some witnesses are not capable of a train of thought on any subject. They can observe no order of events whatsoever, and their ideas are confused even as to time. All that can be done with such witnesses is to direct them simply to answer the questions put to them, and then

confine the questions to the isolated facts it is desired to show by them. A display of anger to such a witness only adds to his confusion. He should be encouraged by looks and expressions of approval. Questions should be framed to meet his difficulties. By observing his answers, and with a little ingenuity, an advocate can readily frame questions to fall in with his degree of intelligence.

Judge Jeffries once mistook one of these apparently stupid witnesses, and having taken quite a dislike to the man (who had been testifying in his court, and who happened to have a very long beard), finally broke out with the remark that if his conscience was as long as his beard, he must have a very vacillating one; to which the witness quickly replied, "My Lord, if you measure consciences by beards, you have none at all."

With a witness who is discovered to be adverse, one who, as the phrase goes, tries to "throw you" on the witness-stand, the method and manner should be entirely different from that employed with a merely stupid witness. The adverse witness should be led to show his bias as soon as possible. The rules of evidence will then allow a resort to leading questions. Advantage should be taken of them, and the witness artfully led to make the admissions wanted. While the advocate

is not allowed to discredit him directly, as he is his own witness, yet if he once succeed in exposing the bias of the witness, what little he can induce him to say in his favor will be doubly effective with the jury, and he can prove by other witnesses the material facts that he has denied, even though the effect would be to indirectly discredit him.

If his evidence is unfavorable and the advocate exhibits the slightest sign of displeasure, he will only add to the bad effect, as there are sure to be men on the jury who form their opinions of the nature and character of the testimony chiefly by the effect which it may appear to produce upon the counsel; whereas, if, after an unfavorable answer, the counsel abandon the witness entirely, he still more intensifies the damage done, and gives the impression of complete demoralization.

The statement should be calmly received and the inquiry quietly turned to some new, but unimportant matter, and an attempt made to tone down and soften the adverse impression made.

The advocate should not examine any witness as though he were catechising him. He should frame his questions as though he were a companion anxious to hear the story the witness is willing to tell, and as if it were all new to him, not as if he had heard it all before

and were merely rehearsing it for the benefit of the jury.

The most elementary rule of evidence in connection with the examination-in-chief is that leading questions shall not be put to your own witness (a leading question being such a one as suggests the answer). It is often excessively difficult to adhere strictly to this rule.

It is properly applicable only to such questions as relate to the *matter at issue*, although it is commonly thought to refer to all questions that suggest the answer. If it were rigidly enforced, trials would be ridiculously prolonged, and it is the practice of all experienced trial judges to allow lawyers to put leading questions almost entirely until the real issue in the case is reached. One no longer says "What is your name?" "Where do you live?" "What is your business?" But "Mr. Brown, I understand you live at No. 6 Madison Avenue, and are in the real estate business with offices at 125 Broadway?" and so on. Thus by quick stages we come to the more important part of the case.

Not long ago I was employing this method of leading a witness quickly to the real issues in a case in a trial conducted before a Supreme Court judge, quite fifteen years my junior, when he stopped me by a rather peremptory direction not to lead my witness. I was taken

quite aback by his tone and meekly remarked that I feared I did not quite know what a leading question was. To this the judge replied, superciliously, "A leading question, Mr. Wellman, is one that suggests the answer." The learned justice had remembered this much from his law-school days, but had forgotten, if he ever knew, that the rule against leading questions applies only to matters material to the issue and not to such preliminary inquiries.

I was placed in a most humiliating position before the jurors by this youthful rebuke, but made no attempt at an effective retort. I was reminded, however, of a rejoinder that Curran once made to an English judge who expostulated at the proposition of law Curran was arguing before him and exclaimed, "If that is the law, Mr. Curran, I may *burn* my law books," to which Curran tartly replied, "Better *read* them, my Lord."

One also recalls the retort made by a leader of the Boston Bar (a man distinguished for his learning) to the presiding judge of the full bench, who had stopped him in his argument with the brusque remark: "That is not the law, counsellor." With fine suavity of manner the counsel replied: "I beg your honor's pardon, it *was* the law before your honor spoke."

Perhaps, however, my own method of making no real reply but accepting the rebuke was the wiser course to pursue, as I am a believer in the wisdom and propriety of showing the greatest courtesy toward the Bench; and then one never can forget the story of the man who told his neighbors in great excitement about how his dog would go out each night and bark and bark at the moon, and when asked, "And then what happened?" he replied: "Oh, nothing, nothing at all; the moon went right on just as it always had!"

On another occasion a judge from one of the up-state circuits of our Federal Courts nearly adjudged me in contempt of court because I started out with all my witnesses by leading questions when interrogating them about their residence, their occupation, and how they happened to come from other cities to testify in our courts, etc.

The learned justice nearly broke the learned bench, so hard did he pound it with his gavel as he ordered me to sit down and desist from such a practice, a practice which in no wise injures the cause of truth but saves an immense amount of time otherwise wasted.

Had I been arraigned for contempt upon this occasion (and it was but a few years ago) I should long to have been represented by some one resembling Mr.

John Clark, afterward the distinguished Lord Eldon, who was remarkable when at the English Bar for the *sang froid* with which he treated the judges.

On one occasion a junior counsellor, on hearing their Lordships give judgment against his client, exclaimed that he was surprised at such a decision. This was construed into a contempt of court and he was ordered to attend at the Bar next morning. Fearful of the consequence he consulted his friend John Clark, who told him to be perfectly at ease, for he would apologize for him in a way that would prevent any unpleasant result. Accordingly, when the name of the delinquent was called, John Clark arose and thus addressed the assembled tribunal: "I am very sorry, my Lords, that my young friend has so far forgotten himself as to treat your honorable Bench with disrespect; he is extremely penitent and you will kindly ascribe his unintentional insult to his ignorance. You must see at once that it did originate in ignorance, for he said he was 'surprised' at the decision of your Lordships; now if he had not been very ignorant of what takes place in this court every day, had he known you but *half* so long as I have done, *he would not be surprised at anything you did!*"

When, however, the main issues of the case are

reached, the rule against leading questions (with few exceptions) is strictly adhered to, and very properly so.

Some lawyers put the clearly inadmissible question which suggests the answer, and though it is ruled out, perhaps with a rebuke from the court, the witness nevertheless has caught the idea. This is disreputable practice.

There are, however, several legitimate ways of assisting the witness's defective memory. One method is to ask him to repeat the whole story over again. Perhaps his second recital contains the part he omitted at the first but makes some new omission, and thus is secured the testimony wanted, but at the same time the witness is proved to be a man of poor memory.

A better way is to so frame the question that it shall contain a part of the forgotten sentence, but otherwise applied, as, for example, by referring to some collateral circumstance which would recall the forgotten phrase. This can be legitimately done if the advocate is quick-witted enough, and thereby readily save the situation.

Every advocate is in honor bound not to transgress the rule against "leading questions" when it really comes to important matters, but it is sometimes ex-

tremely difficult. Indeed, there are cases in which the court, in its discretion, may permit him to ask leading questions in the interests of justice, so that important testimony may not be lost. Suppose, for instance, a witness is giving his memory of a long conversation he overheard between the parties to an action, and, as often happens, leaves out of his narrative perhaps what, in law, amounts to the most important part.

In vain the advocate tries not to lead him. He asks, "Have you given all the conversation?" "Was that all that was said?" The witness remembers no more. The memory of the witness has been exhausted by direct questions, and then the court may properly permit him to lead the witness so far as to ask the witness whether anything was said about so and so (without suggesting what was said), and thus call his attention to the matter which the witness has inadvertently overlooked, and thus save very important testimony which would otherwise be lost.

So too, when it is discovered that a witness is hostile, the court, as already intimated, may permit leading questions to be put, because the reason for the rule against them no longer exists.

In other words, the rule against putting leading questions to your own witness is based upon the ten-

dency of the human mind to adopt the suggestion of the person or side that it desires to aid and to quickly respond to any hint of what is wanted to assist the party making the suggestion. Hence, in the case of a hostile witness obviously the reason for the rule is gone.

In a former chapter I drew attention to some of Hugo Münsterberg's experiments with his psychology classes at Harvard, to ascertain their powers of perception and observation. Because of the significance of his experiments and the important light they throw upon this subject I desire to make further reference to them in connection with this rule against leading questions and against making suggestions to your own witnesses. In his "Essays on Psychology and Crime" he cites many cases of patients who have come under his hypnotic influence, and whom he has attempted to control after they had left his presence by post-hypnotic suggestion. He states, in substance, that it is the consensus of opinion among the leading psychologists of the day that it is not possible for a lawyer to exert an effective hypnotic influence over any witness he may be examining for the first time in court, and that the "hypnotic eye," in such connection, is largely an absurd invention of the imagination of the novelist.

"There is no such thing as hypnotism by a mere

glance or unless the party hypnotized resigns himself voluntarily to the influence, and this process must be gone through with many times before anything like control of the subject is possible; there is no fear that it can be brought about suddenly; it needs persistent influence and works probably only upon neurotic persons."

Of course, effective hypnotic influence could never take place in a court room, but something very similar takes place with most people whose minds are under a great mental or nervous strain; for example, in a panic the minds of all men are especially open to any suggestion. Professor Münsterberg further points out that the nerves controlling the thought passages to the switchboard or central stations of the brain seem to turn off all opposite currents in their automatic action. For example:—

A suggestion to open the hand expels all idea of clenching it; so a false suggestion to one in a normal state of mind is repelled by many other forces, such as a faithful memory, a sound reason, conscience, and judgment. But in a state of any considerable mental excitement these opposing forces are weakened and the false suggestion, now more feebly combated, takes better hold. Emotion certainly increases the susceptibility

of everybody to suggestions; so does fatigue and nervous exhaustion.

The court room is surely a place of great mental excitement. There is also the nervous desire of the witness to help the side calling him, and anxiety to become an important factor in the case. In this state of mind leading or suggestive questions, either on the direct or cross examination, are readily accepted and bear fruit. Hence the wisdom of the rule against leading questions on direct examination.

The psychologist does not need the hypnotic state to demonstrate experimentally how every suggestion may contaminate even the most trustworthy memory. This is well illustrated by another experiment which Professor Münsterberg made with a class of about forty children and adults. They were shown a colored photograph representing the interior of a room in a farmhouse.

The photograph was examined individually by each member of the class with instructions that they were to take special notice of everything that was in the room. The picture was then turned face downward. The class was asked to hand in their written reports of what they had observed.

The picture had plenty of detail; the direct questions

were simple: "How many persons are in the room?" "Does the room have windows?" "What is the man doing?" There were persons and windows and the man was eating soup. But after the direct questions were put the first leading and suggestive question brought 59 per cent of failure.

For example: the leading question was put to each member of the class — "Did you notice the stove in the room?" (there was no stove there) — and 59 per cent of the class answered "Yes," and having once admitted seeing the stove they proceeded to locate it, and tell in what part of the room it was.

The walls of the room were painted red. The students, however, were asked whether the walls were green or blue, and this suggestive question seemed to eliminate the red color of the hall from 50 per cent of the minds.

I quote from one of Professor Münsterberg's articles: —

"No doubt the whole situation of the court room reënforces the suggestibility of every witness. In much-discussed cases current rumors, and especially the newspapers, have their full share in distorting the real recollections. Everything becomes unintentionally shaped and moulded. The imaginative idea which fits

a prejudice, a theory, a suspicion, meets at first the opposition of memory, but shortly it wins in power, and as soon as the suggestibility is exercised, the play of ideas under equal conditions ends, and the opposing idea is annihilated. Easy tests could quickly unveil this changed frame of mind, and, if such a half-hypnotic state of suggestibility had set in, it is no wiser to keep the witness on the stand than if he had emptied a bottle of whiskey in the meantime."

The whole purpose of Professor Münsterberg's essays is, as he says, "to draw the attention of serious men to an absolutely neglected field which demands their full attention."

In time psychology may be able to serve as the handmaiden of justice, but in the meantime there are many practical difficulties to overcome, and it is an intensely interesting and remarkable fact that the jurists have anticipated the researches of psychology. In reviewing the essays of Professor Münsterberg, Chief Justice Simeon E. Baldwin, of Connecticut, says: "The effect of suggestion on a witness is spoken of as something to be understood and explained only by a professed psychologist. The rule of all Anglo-American courts, which excludes questions naturally leading to a desired answer as to a material fact, shows how well jurists have

appreciated this particular tendency of the human mind."

One of the most remarkable cases of suggestive evidence, akin to hypnotism, came under my own observation some years ago when I was defending one of the nurses of the Mills Training School,—a most estimable young man,—who had been indicted for deliberately choking to death a patient in the Insane Ward at Bellevue Hospital.

A reporter of the *Journal* had made a contract with his newspaper for $150 to feign insanity and get himself committed to the insane ward at Bellevue Hospital for the purpose of writing an article upon the treatment of the insane for publication in the *Journal*. During his first night in the hospital one of its patients died, and the reporter conceived the idea of weaving around this occurrence a tragic (though false) story of the abuse of the insane, resulting in death. In his article he claimed to have seen two trained nurses (one of whom was this young man) strangle this patient to death because he would not eat his supper.

He graphically described how these nurses had wound a towel around the insane man's throat and had twisted it until the patient was strangled to death.

Newspaper pictures, occupying a full page of the

Journal, were published, purporting to show all the details of the alleged process, in vogue at the hospital, of strangulation by means of a towel.

The indictment of this young man for murder followed the *Journal* exposure of these alleged hospital abuses.

The whole community was wrought up to a high pitch of excitement.

At the trial the perjury-lying reporter, as a witness for the prosecution, told the same story, but was so thoroughly discredited and brought to bay on the second day of his lengthy cross-examination that he fled the town, writing from Philadelphia to his mother in this city that he dare not ever return to New York.

This fact, however, could not be communicated to the jury, during the trial, still unfinished, and the greatest difficulty to overcome was the fact that *three insane patients* were brought from the same hospital by the Assistant District Attorney, and called as witnesses, and (being found by the court to have sufficient intelligence) were allowed to testify to all the alleged details of the murder as they themselves had witnessed it.

All three of these insane patients had seen and studied the pictures and descriptions published in the *Journal*, and these pictorial reproductions of occurrences alleged

to have taken place in their own wards at the asylum, had served as such vivid, though false suggestions to their diseased minds (already naturally antagonistic to their keepers and nurses) that they afterwards honestly believed and felt warranted in taking an oath that they themselves had actually witnessed these very occurrences that had also been sworn to by the reporter.

These three witnesses—as many people suffering from certain forms of insanity are quite capable of doing—gave their testimony in the most remarkably graphic and convincing manner, and it made such a profound impression upon the court and jury, and the prosecution was so bitter and determined, that it seemed almost impossible to prevent the conviction of my client.

The jurors, however (having been carefully chosen by both sides from a "special panel"), were unusually intelligent and competent to carefully weigh the false (though honest) testimony of these three witnesses against certain scientific and medical testimony offered in behalf of the defence which conclusively showed that the deceased could not have been strangled to death, and this very long trial ended in a prompt acquittal of the defendant.

This case is a striking illustration of the dangerous effect of leading and false suggestions upon minds sus-

ceptible of such influences, and in this instance came very near resulting in the conviction and possible execution of an entirely innocent and very worthy young man.

The case was also unique in that it is believed that never before in this country has there been called in any one case such a large number of the most distinguished pathologists and surgeons — including the late Dr. William T. Bull — who by their testimony conclusively established the incontrovertible scientific and medical facts upon which the defence was chiefly based. Indeed, taken all together, it was one of the most remarkable trials of recent years, but the newspapers, being in a sense themselves on trial, published practically nothing about it.

A very common fault to be observed almost every day in our courts upon direct examination is that of pressing the witness too far. Counsel become so enamoured with a favorable answer that they seem to want to hear it again and again. It is a pretty good rule to remember to "let well enough alone."

Harris gives an interesting example of this rule. A junior counsel was conducting a case before Mr. Justice Hawkins. The fact seemed pretty clear upon the bare statement of the prosecution. "Are you quite sure of this fact?" "Yes," said the witness. "Quite?" in-

quired the counsel. "Quite," said the witness. "You have no doubt?" persisted the counsel, thinking that he was making assurance doubly sure. "Well," said the witness, "I haven't much doubt, because I asked my wife." Mr. Justice Hawkins: "You asked your wife in order to be sure in your own mind?" "Quite so, my Lord." "Then you had some doubt before?" "Well, I may have had a little, my Lord." This ended the case, because the whole question turned upon the absolute certainty of the witness's mind.

If an adversary is examining in chief, an advocate should be ever on the watch for improper questions. I do not refer to leading questions alone, but to those vastly more numerous ones that violate some rule of evidence.

If one observes a skilful and rather unfair examiner handle his witnesses when opposed only by some beginner, it is amazing what an amount of inadmissible testimony he adroitly imports into the case, owing to the fact that his opponent is unfamiliar with the rules of evidence; whereas to an experienced advocate the rules of evidence become so familiar that a question that violates one of them is as quickly discerned by him as a discord would be by a trained musician.

The following criminal case, reported by Harris,

serves as an excellent example of the folly of intrusting the examination-in-chief to inexperienced hands.

The prisoner had committed an atrocious murder, and the main evidence against him was the dying declaration of his victim — his wife. It is a well-known rule of evidence that any dying declaration made in the absence of the prisoner can only be received in evidence after independent proof that the declaration was made with the *full consciousness* and expectation of approaching death.

The doctor who attended the wife was called as a witness to prepare the way for the dying declaration, which, if allowed in evidence, would undoubtedly have hanged the prisoner.

The young prosecuting attorney asked, "Did she *fear* death?" "No," said the doctor. The lawyer stared in astonishment at the witness, who was perfectly cool, as most doctors are in the witness-box, and who made no effort to assist the district attorney. The ingenious young counsellor, however, repeated the question. "Did she *fear* death?" Answer: "Oh dear no, not at all." The judge: "You cannot put the statement in evidence; the witness may step down"; then turning to the jury, "and you, gentlemen, cannot find a verdict of guilty."

The blank look on the face of the counsel, the sagacious smile of the judge, who evidently thought the right question would be put next, the quick perceptive glance of the witness who stood leaning on the witness-box with his hands carelessly folded — all this is graphically described by Harris, who was present.

The answer of the doctor was true so far as it went, for the woman did not *fear* death, but it was also true, that she was *conscious* of approaching death, and if this had been brought out by the proper question, the dying declaration could have been made admissible.

One of the most pernicious habits in a trial is that of making constant objections to evidence on trivial matters. It is a very common fault among young advocates. The lawyer who is constantly shouting out "we object," "we object," without solid ground for his objection is in reality losing his case as fast as he possibly can, as well as befogging and delaying the trial and annoying the presiding judge.

The objecting and objectionable young lawyer imagines he is displaying his knowledge of evidence and proving himself smart. The jury, on the other hand, only get the idea that there must be some very damaging evidence which he is trying to keep from their ears, and as the truth is what they are after, they have little

patience with anybody who tries to hide it from them.

A rule I would urge upon young advocates is "never to be moved to anger by anything, however provoking, and however you may appear, for policy's sake, to be in a passion."

Colton says that the "intoxication of anger, like that of the grape, shows us to others but hides us from ourselves; unnerves us and unmans us, and in every way unfits us for the business of the courts, especially if the trial is a difficult one."

An advocate should not be disconcerted if his women witnesses lose their tempers in the witness-box, for the rules of evidence happen to be peculiarly repressive of feminine conversation.

In closing this chapter I have but one suggestion more, and that is in regard to the examination of the parties to the suit — the clients. Here should be pursued quite a different method, even though it allow them a very loose rein.

It is often a clever move to interrogate a party to a suit — known to be honest — on matters which the advocate knows him to be uncertain, although he can readily prove them by some one else. The client will answer that "He couldn't be certain enough about

that to swear to it." When, afterwards, the fact is proved independently of him, every one will think better of him for being so scrupulously careful in speaking of a matter which might perhaps be vital to his chance of winning his case.

Parties very properly feel that they are the chief actors in the drama and are more or less proud of having brought so many people together to hear and decide their wrongs; then, too, it is they who pay the advocates for their time. The parties' appreciation of their own supreme importance reminds me of the story of the highwayman, of whom it is related, that when the chaplain, on the way to the scaffold, said he feared they would be late, the condemned one answered, "Never trouble about that, sir; they can't begin without us."

ART IN CROSS-EXAMINATION

CHAPTER XI

ART IN CROSS-EXAMINATION

By far the most fascinating part of the advocate's work is the cross-examination of witnesses.

This branch of trial work has been the subject of many years of thought and persistent study upon my part, and it is a difficult task to properly present this topic within the limited space allotted for such a complicated subject. I hope, however, to be able to point out some of the subtle arts of the cross-examiner in arriving at truth and to give some hints and suggestions that will be useful to the general reader as well as be helpful to the young advocate to enable him to escape some of the painful results of blunders that might otherwise come to him when acquiring practical knowledge in the hard training-school of experience.

The cross-examiner enters upon his work from a point of view directly opposite from that of the examiner-in-chief. When examining his own witnesses, he goes upon the assumption that they are trustworthy people and are testifying only to the truth. When he rises to

cross-examine his adversaries' witnesses, he starts out with the assumption that the witness is either intentionally untruthful or else he is in error because of ignorance, mistake, prejudice, or some other cause.

He is supposed to know all about his own witnesses, and thereby is enabled to develop their story clearly and effectively. With his adversaries' witnesses, however, he comes across persons of whom he knows nothing, except what he has heard and observed about them as they were giving their evidence upon their direct examination. Cross-examination, therefore, calls for quite a different method of treatment than the examination-in-chief.

Cross-examination is generally considered to be the most difficult branch of the multifarious duties of the advocate. Success in the art, as some one has said, comes more often to the happy possessor of a genius for it. Great lawyers have often failed lamentably in it, while great success has sometimes crowned the efforts of those who might otherwise have been regarded as of a *mediocre* grade in the profession. Personal experience, however, and the emulation of others trained in the art, are the surest means of obtaining proficiency in this all-important prerequisite of a competent advocate.

One may have a greater aptitude for cross-examination than another, but even the most gifted require many years of training and careful observation to arrive at anything approaching perfection.

It requires the greatest ingenuity; a habit of logical thought; clearness of perception; infinite patience and self-control; power to read men's minds intuitively, to judge of their characters by their faces, to appreciate their motives; ability to act with force and precision; a masterful knowledge of the subject-matter in hand; an extreme caution; and, above all, *the instinct to discover the weak point in the witness* under cross-examination.

One has to deal with a prodigious variety of witnesses testifying under an infinite number of differing circumstances. It involves all shades and complexions of human morals, human passions, and human intelligence, and almost invariably resolves itself into a mental duel between advocate and witness.

When an advocate rises to cross-examine a witness, the first inquiry should naturally be, Has the witness testified to anything that is material against him? Has his testimony injured his side of the case? Has he made an impression with the jury against him? Is it necessary for him to cross-examine at all?

Most young lawyers seem to think it is necessary to

cross-examine every witness called against their side of a case. Being conscious of their own capacity as trial lawyers, they are afraid of being criticised by their clients or associates if they lose the opportunity for cross-examining.

At the very threshold of this discussion let me denounce this idea as most erroneous.

Almost daily, even now, the lawyers associated with me in my cases expostulate with me for allowing witnesses to leave the stand without any cross-examination, until the excited whisper in my ear, "Aren't you going to ask this witness any questions at all?" has become so familiar that I should almost miss its absence in my daily work.

Harris gives an amusing instance of the folly of attempting to cross-examine a police officer in a Magistrate's court. His advice is to leave them alone as far as possible, as they are dangerous persons. All the ordinary questions have been answered by them scores of times. He warns young attorneys about imagining they are going to trip up a policeman upon the path where his beat has been for many a year, for the officer will perceive the lawyer coming while he is still a long way off and in all probability go out and meet him; for, maybe, before the young attorney was

even born, the policeman has answered the very question the attorney puts.

"What did you say when you arrested the prisoner?" asked a young attorney, eager for the display of his ability in cross-examination.

"Oh," said the shrewd officer, "I quite forgot that, my Lord." (He always takes "my Lord" into his confidence.) "I beg your lordship's pardon. I said, 'Now, see 'ere, Sykes, when you came out from doing the last seven years, you told me you meant to turn over a new leaf, and *'ere you are agin.*' "—And there the counsel was again.

It is the greatest mistake to cross-examine every witness.

An advocate should remember that "he is the greatest cross-examiner who makes the fewest blunders," and a single mistake may make an opening for a flood of testimony that may overwhelm him.

Supposing a witness has testified either to immaterial matters only, or if to material ones, only to such as can be contradicted by a host of witnesses on his own side. Cross-examination in such cases is not only unnecessary, but everything that is unnecessary in cross-examination is dangerous.

To illustrate: A witness was lately called to prove

the acceptance of a bill of exchange to be in the handwriting of the defendant. Defendant's counsel, wanting to make an appearance of cross-examination, asked the witness the unnecessary and useless question, as to what opportunity he had had of judging of the defendant's handwriting. *Had he ever seen him write? etc.* The witness replied quietly, "Why, sir, when I was sheriff's officer, I arrested him *several times* and have seen him *sign his own bail bonds over and over again!*"

Perhaps a witness may have testified in a timid, half-frightened way to some material fact, and it would be easy to break down such a witness by a few sharp blustering questions such as we observe every day in our courts, but a jury readily sees that such a witness, though broken by such a cross-examination, is really honest in the main, and a cross-examination would only cause the sympathies of the jury to go out to the witness and against the lawyer, and what was, at first, more or less harmless testimony, assumes a sudden importance. Jurors will always take sides with the weak against the strong. "It is not a mark of ability to confuse the weak; it is an evidence of a want of sagacity."

Then, too, it should be remembered that fishing questions are very apt to catch the wrong answers.

But suppose the witness has testified to material facts against an advocate's side, and it becomes his duty to break the force of his testimony, or abandon all hope of a jury verdict. How shall he begin? How shall he tell whether the witness has made an honest mistake, or has committed perjury? The methods in his cross-examination in the two instances would naturally be very different. There is a marked distinction between discrediting the testimony and discrediting the witness. It is largely a matter of instinct on the part of the examiner. Some people call it the language of the eye, or the tone of the voice, or the countenance of the witness, or his manner of testifying, or all combined, that betrays the wilful perjurer. It is difficult to say exactly what it is, excepting that constant practice seems to enable an advocate to form a fairly accurate judgment on this point. A skilful cross-examiner seldom takes his eye from an important witness while he is being examined by his adversary. Every expression of his face, especially his mouth, even every movement of his hands, his manner of expressing himself, his whole bearing — all help the examiner to arrive at an accurate estimate of his integrity.

During a witness's direct examination an advocate

should always be on the lookout for an opening for his cross-examination. He should try to detect the weak spot in his narrative. If he does, he should waste no time, but go direct to the point. It may be that the witness's relation to the parties or the subject-matter of the suit should be disclosed to the jury, as one reason why his testimony has been shaded somewhat in favor of the side on which he testifies. It may be that he has a direct interest in the result of the litigation, or is to receive some indirect benefit therefrom. Or he may have some other tangible motive which he can gently be made to disclose. Perhaps the witness is only suffering from that partisanship, so fatal to fair evidence, of which oftentimes the witness himself is not conscious. It may even be that, if the jury only knew the scanty means the witness has had for obtaining a correct and certain knowledge of the very facts to which he has sworn so glibly (aided by the adroit questioning of the opposing counsel), this in itself would go far toward weakening the effect of his testimony.

It may appear, on the other hand, that the witness had the best possible opportunity to observe the facts he speaks of, but had not the intelligence to observe these facts correctly. Two people may witness the

same occurrence and yet take away with them an entirely different impression of it; but each, when called to the witness-stand, may be willing to swear to that impression as a fact. Obviously, both accounts of the same transaction cannot be true. Whose impressions were wrong? Which had the better opportunity to see? Which had the keener power of perception?

What shall be the first mode of the advocate's attack? Shall he adopt the fatal method of those we see daily in the courts, and proceed to take the witness over the same story that he has already given his adversary, in the absurd hope that he is going to change it in the repetition, and not retell it with double effect upon the jury? Or shall he rather avoid carefully his original story, except in so far as is necessary to refer to it in order to point out its weak spots? Whatever he does should be done with quiet dignity, with absolute fairness to the witness; and he should frame his questions in such simple language that there can be no misunderstanding or confusion. It is marvellous how much may be accomplished with the most difficult witness simply by good humor, a smile, and a tone of friendliness.

Let the advocate imagine himself in the jury-box, so that he may see the evidence from their standpoint. He should not try to make a reputation for himself

with the audience as a "smart" cross-examiner. He should think rather of his client and his employment by him to win the jury upon his side of the case. He should avoid also asking questions recklessly, without any definite purpose. Unskilful questions are worse than none at all, and only tend to uphold rather than to destroy the witness.

It is absurd to suppose that any witness who has sworn positively to a certain set of facts, even if he has inadvertently stretched the truth, is going to be readily induced by a lawyer to alter them and acknowledge his mistake. People, as a rule, do not reflect upon their meagre opportunities for observing facts, and rarely suspect the frailty of their own powers of observation. They come to court, when summoned as witnesses, prepared to tell what they think they know; and in the beginning they resent an attack upon their story as if it were an attack upon their integrity.

If the cross-examiner allows the witness to see, by his manner toward him at the start, that he distrusts his integrity, he will straighten himself in the witness-chair and mentally defy him at once. If, on the other hand, the advocate's manner is courteous and conciliatory, the witness will soon lose the fear all witnesses have of the cross-examiner, and can almost imperceptibly

tibly be induced to enter into a discussion of his testimony in a fair-minded spirit, which, if the cross-examiner is clever, will soon disclose the weak points in the testimony.

The celebrated Scarlett in his cross-examinations "would take those he had to examine, as it were, by the hand, make them his friends, enter into familiar conversation with them, encourage them to tell him what would best answer his purpose, and thus secured a victory without appearing to commence a conflict."

The sympathies of the jury are invariably on the side of the witness, and they are quick to resent any discourtesy toward him. They are willing to admit his mistakes, if they can be made apparent, but are slow to believe him guilty of perjury. Alas, how often this is lost sight of in our daily court experiences! One is constantly brought face to face with lawyers who act as if they thought that every one who testifies against their side of the case is committing wilful perjury. No wonder they accomplish so little with their cross-examination! By their shouting, browbeating style they often confuse the wits of the witness, it is true; but they fail to discredit him with the jury. On the contrary, they elicit sympathy for the witness they are attacking, and little realize that their "vigorous cross-

examination," at the end of which they sit down with evident self-satisfaction, has only served to close effectually the mind of at least one fair-minded juryman against their side of the case, and as likely as not it has brought to light some important fact favorable to the other side, which had been overlooked in the examination-in-chief.

A browbeating counsel asked a witness during an assault case at what distance he was when the assault happened. "Just four feet five and one-half inches," came the reply. "How came you to be so very exact?" said the angry counsel. "Because," said the witness, "I expected some fool or other to ask me and so I measured it."

It is one thing to have the opportunity of observation, or even the intelligence to observe correctly, but it is still another to be able to retain accurately, for any length of time, what one has once seen or heard, and what is perhaps more difficult still — to be able to describe it intelligibly. Many witnesses have seen one part of a transaction and heard about another part, and later on have become confused in their own minds, or perhaps only in their modes of expression, as to what they have seen themselves and what they have heard from others. All witnesses are prone to exaggerate

— to enlarge or minimize the facts to which they take oath.

A very common type of witness, met with almost daily, is the man who, having witnessed some event years ago, suddenly finds that he is to be called as a witness. He immediately attempts to recall his original impressions; and gradually, as he talks with the attorney who is to examine him, he amplifies his story with new details which he leads himself, or is led, to believe are recollections and which he finally swears to as facts.

Many people seem to fear that an "I don't know" answer will be attributed to ignorance on their part. Although perfectly honest in intention, they are apt, in consequence, to complete their story by recourse to their imagination. Few witnesses fail, at least in some part of their story, to entangle facts with their own beliefs and inferences. It is unintended error rather than deliberate falsehood that makes human testimony so unreliable.

Witnesses are almost always favorable to the party who calls them, and this feeling induces them to conceal some facts and to color others which might, in their opinion, be injurious to the side for which they give their testimony. It is well to exhibit the interest, bias,

or prejudice of a witness as early as possible in his examination. It is most easily understood by jurors as a motive for exaggeration. Partisanship in the witness-box is most fatal to fair evidence; and when we add to the partisanship of the witness the similar leaning of the lawyer who is conducting the examination, it is easy to produce evidence that varies very widely from the exact truth. This is often done by overzealous advocates putting leading questions or by incorporating two questions into one, the second, a simple one, misleading the witness into a "yes" for both, and thus creating an entirely false impression. For example, "Did you pay the money to the plaintiff's *agent?*" The answer comes, "Yes" to this double question. He may, in truth, have paid the money, but not to the plaintiff's agent.

What is it in the human make-up which invariably leads men to take sides when they come into court? In the first place, witnesses usually feel more or less complimented by the confidence that is placed in them by the party calling them to prove a certain state of facts, and it is human nature to try to prove worthy of this confidence. This feeling is unconscious on the part of the witness and usually is not a strong enough motive to lead to actual perjury in its full extent, but

it serves as a sufficient reason why the witness will almost unconsciously color the evidence to suit a particular purpose, and perhaps add only a bit here, or suppress one there, but this bit will make all the difference in its meaning and effect.

Many men in the witness-box feel and enjoy a sense of power to direct the verdict toward the one side or the other, and cannot resist the temptation to indulge this feeling so as to be thought a "fine witness" for their side. I say their side, because the side for which they testify always becomes their side the moment they take the witness-chair, and they instinctively desire to see that side win, although they may be entirely devoid of any other interest in the case whatsoever.

It is a characteristic of the human race to be intensely interested in the success of some one party to a contest, whether it be a war, a boat race, a ball game, or a lawsuit. This desire to win seldom fails to color the testimony of a witness and to create inferences and fallacies dictated by the witness's feelings rather than by his intellect or the dispassionate powers of observation.

A French thinker says, "Men have seen a very simple fact; gradually when it is distant, in thinking of it, they interpret it, amplify it, provide it with details, and their imaginary details become incorporated into the

actual details, and seem themselves to be recollections." Hence it is one of the objects of cross-examination to separate imagination from memory, and fact from inference.

All these considerations should readily suggest a line of questions, varying with each witness examined, that will, if closely followed, be likely to separate appearance from reality and to reduce an exaggerated story to its proper proportions.

It must be further borne in mind that the jury should not merely see the mistake; they should be made to appreciate, at the time, why and whence it arose. It is fresher then and makes a more lasting effect than if left until the summing up, and then drawn to the attention of the jury.

The experienced examiner can usually tell, after a few simple questions, what line to pursue. Let him picture the scene in his own mind; closely inquire into the sources of the witness's information, and draw his own conclusions as to how his mistake arose, and why he formed his erroneous impressions. An advocate should exhibit plainly his belief in the integrity of the witness and a desire to be fair with him, and try to induce him into being candid. When the particular foible which has colored his testimony has once been discovered, he can

easily be led to expose it to the jury. His mistakes should be drawn out more often by inference than by direct question, because all witnesses have a dread of self-contradiction. If he sees the connection between the inquiries and his own story, he will draw upon his imagination for explanations, before the advocate gets the chance to point out to him the inconsistency between his later statement and his original one.

It is often wise to break the effect of a witness's story by putting questions to him that will acquaint the jury at once with the fact that there is another more probable story to be told later on; to disclose to them something of the defence, as it were.

The mistake should be avoided, so common among the inexperienced, of making much of trifling discrepancies. It has been aptly said that "juries have no respect for small triumphs over a witness's self-possession or memory."

The loquacious witness should be allowed to talk on; he will be sure to involve himself in difficulties from which he can never extricate himself.

Some witnesses prove altogether too much; they should be encouraged and led by degrees into exaggerations that will conflict with the common sense of the jury.

Under no circumstances should a false construction be put on the words of a witness; there are few faults in an advocate more fatal with a jury.

If, perchance, he obtains a really favorable answer, he should leave it and pass quietly to some other inquiry. The inexperienced examiner in all probability will repeat the question with the idea of impressing the admission upon his hearers (instead of reserving it for the summing up), and will attribute it to bad luck that his witness corrects his answer or modifies it in some way, so that the point is lost. He is indeed a poor judge of human nature who supposes that if he exults over his success during the cross-examination he will not quickly put the witness on his guard to avoid all future favorable disclosures.

J. W. Donovan, the author of "Modern Jury Trials," quotes the *Brooklyn Eagle's* account of a trial conducted by Charles Spencer against the late Edwin James as opposing counsel in a soldier's claim for $1800, money loaned to a friend after the war. Defendant's counsel, Mr. James, cross-examining the plaintiff: —

Q. "You loaned him $1800?"

A. "I did, sir."

Q. "When, sir?"

A. "In 1866."

Q. "*Where did you get it?*"

A. "I *earned* it, sir," he replied meekly.

Q. "When did you earn it?"

A. "During the war, sir" (meekly).

Q. "What was your occupation during the war?"

A. "(Modestly) Fighting, sir."

Up to this time the case had been somewhat in doubt, but the jury suddenly turned to the side of the soldier.

Colonel Spencer immediately went to the jury and talked about the soldier, "who guarded our liberties, helped to save our nation, risked his life," etc., and won the verdict.

Commenting upon the case the same day, Mr. James said to Mr. Spencer, "That war speech of yours did it, and it was all the fault of my cross-examination. Otherwise, you would have known nothing about his war record." "Ah," said Spencer, "the mistake that you made was that you didn't find out that my client was a *Confederate* soldier or you could have changed the whole verdict yourself."

The evidence often seems to be going all one way when in reality it is not so at all. The cleverness of the cross-examiner has a great deal to do with this; he can often create an atmosphere which will obscure much evidence that would otherwise tell against him. This is

part of the "generalship of a case," which is of vast consequence in its progress to the argument. There is eloquence displayed in the examination of witnesses as well as on the argument.

The very intonations of voice and the expression of face of the cross-examiner can be made to produce a marked effect upon the jury and enable them to appreciate fully a point they might otherwise lose altogether.

"Once, when cross-examining a witness by the name of Sampson, who was sued for libel as editor of the *Referee*, Sir Charles Russell asked the witness a question which he did not answer. 'Did you hear my question?' said Russell, in a low voice. 'I did,' said Sampson. 'Did you understand it?' asked Russell, in a still lower voice. 'I did,' said Sampson. 'Then,' said Russell, raising his voice to its highest pitch, and looking as if he would spring from his place and seize the witness by the throat, 'why have you not answered it?' Tell the jury why you have not answered it. A thrill of excitement ran through the court room. Sampson was overwhelmed, and he never pulled himself together again."

The tone of voice when asking a question has the greatest effect with witness and jury. Every one knows

that emphasis on one particular word produces quite a different effect than upon another.

The following anecdote of a well-known actor and musician, Tom Cooke, as told by the *London Sunday Times*, affords a good illustration of the important part played by emphasis and accent.

At a trial between certain music publishing houses as to an alleged piracy of a popular song, Cooke was subpoenaed as an expert witness by one of the parties. On his cross-examination by Sir James Scarlett, that learned gentleman rather flippantly questioned him thus: —

"'Sir, you say that the two melodies are the same but different. Now, what do you mean by that?'

"To this Cooke promptly answered, 'I said that the notes in the two copies are alike, but with a different accent, the one being in common time and the other in six-eight time; and consequently, the position of the accent of the notes was different.'

"*Sir James.* 'What is a musical accent?'

"*Cooke.* 'My terms are nine guineas a quarter, sir.' (A laugh.)

"*Sir James* (rather ruffled). 'Never mind your terms here; I ask you, what is a musical accent? Can you *see* it?'

"*Cooke.* 'No, Sir James.'

"*Sir James.* 'Can you *feel* it?'

"*Cooke.* 'A *musician* can.' (Great laughter.)

"*Sir James* (very angry). 'Now, pray, sir, don't beat about the bush, but explain to his lordship and the jury, who are expected to know nothing about music, the meaning of what you call accent.'

"*Cooke.* 'Accent in music is a certain stress laid upon a particular *note* in the same manner as you would lay a stress upon a given *word* for the purpose of being better understood. Thus, if I were to say, "You are an *ass*," the accent rests on *ass;* but if I were to say, "*You* are an ass," it rests on *you*, Sir James.'

"Reiterated shouts of laughter by the whole court, in which the bench itself joined, followed this repartee."

Sometimes it is a safe and useful experiment for an advocate to draw out a few trifling, harmless questions to test the temper and feeling of the witness. Perhaps he doesn't care much for the other side after all and would be quite as willing to help him if he takes a fancy to him. If the advocate jumps at such a witness or speaks sharply to him at the start, he may turn his feeling of indifference toward his adversary into positive partisanship. But if he finds out that the witness really

has a strong feeling in the matter, the sooner he leaves him alone, the better.

There is no art in trying to bully any witness; sometimes loud tones and angry expressions unseat a timid witness; but whatever a jury puts down to the advocate's ability or the witness's stupidity never helps your cause — the ascertaining of the truth.

Sometimes an examiner can make a hostile witness appear too hostile. If by well-conceived questions he can make him exhibit his strong feeling, he will thereby weaken the force of anything he may say against him. This is especially true if he can make the witness exhibit any *spite* in the witness-box.

With an over-positive witness one way of destroying him is to induce him to be equally positive about some matters he cannot possibly harmonize with those he has already sworn to or else as to which he can be surely contradicted by a score of other witnesses or by documents, letters, or public records.

It sometimes happens that a witness is actuated by really strong motives, such as revenge or hatred. If suspicions are aroused in this regard, the advocate should endeavor to ascertain what the motive is. By watching carefully he will usually discover a difference in tone or manner when speaking from his particular

motive. He will lay particular stress upon such parts of his testimony which he may think are most damaging, and he will display his satisfaction in his manner and facial expression. By exposing to the jury any such strong motive on the part of an opposing witness an examiner has gone a long way toward neutralizing the effect of any adverse turn he may have given to the evidence.

The downright liar should be encouraged to exaggerate the way he thinks the advocate doesn't want him to. He will soon be found stretching his imagination to such an extent that nobody will believe a word he says.

It is an old saying that "a liar is not to be believed even when he speaks the truth."

An advocate should always reserve the question he wants answered until his witness is in the right humor to answer it. Sometimes he can so frame his questions as to lay himself open to an obvious retort by the witness. If he takes the bait and gets a good laugh on the examiner, that is the time to put the important question. While the witness is still excited and exultant at getting the best of the examiner, then the important question should be put as if it was only a most casual inquiry and the truthful answer will come before the witness is aware of it.

Sometimes, again, it is useful not even to suggest the real question until the witness has left the witness-chair and has gone halfway to his seat, then suddenly call him back, as if the examiner had forgotten something, — and then get the answer wanted amidst his excitement in having to resume his testimony.

It is a safe rule never to reply to a witness or be led into a retort unless it is a crushing one.

Curran, with his jokes, in one way or another always contrived to throw the witnesses he was examining off their centre and he took care that they seldom recovered. "My Lord, my Lord," vociferated a peasant witness, writhing under mental excruciation when being cross-examined by Curran, "I cannot answer yon little gentleman; he is putting me in such a doldrum." "A doldrum, Mr. Curran? What does the witness mean by a doldrum?" exclaimed Lord Avonmere. "Oh, my lord, it is a very common complaint with persons of this description; it is merely *a confusion of the head arising from a corruption of the heart.*"

The most difficult of all witnesses to handle is the intentional fraud, or perjured witness. I don't mean where the story is made out of whole cloth, — in court parlance called the "wringer," — but where the witness was really present at the transactions concerning

which he testifies, and where his testimony is partly true and partly false. Perhaps the greater part true, but false as to the essential part, the part which is likely to control the verdict.

Here it is that the greatest ingenuity of the advocate is called into play. Here rules help but little compared with years of actual experience. It requires great tact, ingenuity, and patience to handle such a witness, and a very great delicacy of touch in manipulating the facts which the examiner knows he has colored, or the others he knows he has intentionally suppressed, and still more important, the ones he knows the witness has invented.

It is a hard thing for an advocate to exhibit a witness in the same light to a jury as he appears to him. They are not trained to sift evidence as the experienced cross-examiner is, and they will not so readily detect deceit. A jury is very quick to discover an attempt to deceive them, however, and it is a sorry day for either lawyer or witness who is detected trying the experiment.

Witnesses of a low grade of intelligence, when they testify falsely, usually display it in various ways: in the voice, in a certain vacant expression of the eyes, in a nervous twisting about in the witness-chair, in an apparent effort to recall to mind the exact wording of

their story, and especially in the use of language not suited to their station in life. On the other hand, there is something about the manner of an honest but ignorant witness that makes it at once manifest to an experienced lawyer that he is narrating only the things that he has actually seen and heard. The expression of the face changes with the narrative as he recalls the scene to his mind; he looks the examiner full in the face; his eye brightens as he recalls to mind the various incidents; he uses gestures natural to a man in his station of life, and suits them to the part of the story he is narrating, and he tells his tale in his own accustomed language.

If, however, the manner of the witness and the wording of his testimony bear all the earmarks of fabrication, it is then often useful, as a first question, to ask him to repeat his story. Usually he will repeat it in almost identically the same words as before, showing he has learned it by heart. Of course it is possible, though not probable, that he has done this and still is telling the truth. An examiner should try him by taking him in the middle of his story, and from there jump him quickly to the beginning and then to the end of it. If he is speaking by rote rather than from recollection, he will be sure to succumb to this method. He has no

facts with which to associate the wording of his story; he can only call it to mind as a whole, and not in detachments. His attention should be drawn to other facts entirely dissociated with the main story as told by himself. He will be entirely unprepared for these new inquiries, and will draw upon his imagination for answers. His thoughts should be distracted again to some new part of his main story and then suddenly, when his mind is upon another subject, the examiner should return to those considerations to which he had first called his attention, and ask him the same question a second time. He will again fall back upon his imagination and very likely will give a different answer from the first — and then the examiner has him in his net. The witness cannot invent answers as fast as the advocate can invent questions, and at the same time remember his previous inventions correctly; he cannot keep his answers all consistent with one another. He will soon become confused, and, from that time on, will be at the examiner's mercy. He should let him go as soon as he has made it apparent that the witness is not mistaken, but lying.

An interesting account is given in the *Green Bag* for November, 1891, of one of Jeremiah Mason's cross-examinations of such a witness. "The witness had

previously testified to having heard Mason's client make a certain statement, and it was upon the evidence of that statement that the adversary's case was based. Mr. Mason led the witness round to his statement, and again it was repeated verbatim. Then, without warning, he walked to the stand, and pointing straight at the witness said, in his high, impassioned voice, 'Let's see that paper you've got in your waistcoat pocket!' Taken completely by surprise, the witness mechanically drew a paper from the pocket indicated, and handed it to Mr. Mason. The lawyer slowly read the exact words of the witness in regard to the statement, and called attention to the fact that they were in the handwriting of the lawyer on the other side.

"'Mr. Mason, how under the sun did you know that paper was there?' asked a brother lawyer. 'Well,' replied Mr. Mason, 'I thought he gave that part of his testimony just as if he'd learned it, and I noticed every time he repeated it he put his hand to his waistcoat pocket, and then let it fall again when he got through.'"

If perjured testimony in our courts were confined to the ignorant classes, the work of cross-examining them would be a comparatively simple matter, but unfortunately for the cause of truth and justice this is far from the case. Perjury is decidedly on the increase,

and at the present time scarcely a trial is conducted in which it does not appear in a more or less flagrant form. Nothing in the trial of a cause is so difficult as to expose the perjury of a witness whose intelligence enables him to hide his lack of scruple. There are various methods of attempting it, but no uniform rule can be laid down as to the proper manner to be displayed toward such a witness. It all depends upon the individual character to be unmasked. In a large majority of cases the chance of success will be greatly increased by not allowing the witness to see that he is suspected, before he has been led to commit himself as to various matters with which the advocate has reason to believe he can confront him later on.

Two famous cross-examiners at the Irish Bar were Sergeant Sullivan, afterwards Master of the Rolls in Ireland, and Sergeant Armstrong. Barry O'Brien, in his "Life of Lord Russell," describes their methods. "Sullivan," he says, "approached the witness quite in a friendly way, seemed to be an impartial inquirer seeking information, looked surprised at what the witness said, appeared even grateful for the additional light thrown on the case. 'Ah, indeed! Well, as you have said so much, perhaps you can help us a little further. Well, really, my Lord, this is a very intelligent man.'

So playing the witness with caution and skill, drawing him stealthily on, keeping him completely in the dark about the real point of attack, the 'little sergeant' as he was called waited until the man was in the meshes, and then flew at him and shook him as a terrier would a rat.

"The 'big Sergeant' (Armstrong) had more humor and more power, but less dexterity and resource. His great weapon was ridicule. He laughed at the witness and made everybody else laugh. The witness got confused and lost his temper, and then Armstrong pounded him like a champion in the ring."

In some cases it is wise for the examiner to confine himself to one or two salient points on which he feels confident he can get the witness to contradict himself out of his own mouth. It is seldom useful to press him on matters with which he is familiar. It is the safer course to question him on circumstances connected with his story, but to which he has not already testified and for which he would not be likely to prepare himself.

The advocate should try to show that his story is inconsistent with itself, or with other known facts in the case, or with the ordinary experience of mankind. There is a wonderful power in persistence. If he fails in one quarter, he should abandon it and try something else. There is surely a weak spot somewhere if the

story is perjured. He should frame his questions skilfully. He should ask them as if he wanted a certain answer when in reality he desires just the opposite one. He should ask no questions that afford the witness a chance to give his reasons or explanations, for it is certain they will be damaging to the examiner, not to himself. "Hold your own temper while you lead the witness to lose his" is a Golden Rule on all such occasions.

Some witnesses, under this style of examination, lose their tempers completely, and if the examiner only keeps his own and puts his questions rapidly enough, he will be sure to lead the witness into such a web of contradictions as entirely to discredit him with any fair-minded jury. A witness, in anger, often forgets himself and speaks the truth. His passion benumbs his power to deceive.

Sometimes a witness displays his temper on such occasions by becoming sullen, and if the examiner can succeed in tiring out the witness or driving him to the point of sullenness, he then begins by giving evasive answers, and ends by refusing to answer at all. He might as well go a little further and admit his perjury at once, so far as the jury is concerned, for the examiner has produced the *effect* of lying.

All men stamp as probable or improbable what they themselves would or would not have said or done under similar circumstances — "as in water, face answereth to face, so the heart of man to man." Things inconsistent with human knowledge and experience are properly rated as improbable.

It is often of the greatest service to frame cross-questions with the object of disclosing the improbabilities of the testimony it is sought to discredit.

This search for probabilities, however, is a hazardous occupation for the inexperienced. There is a very great danger of bringing out some incidental circumstance that serves only to confirm or corroborate the statements of a witness made before the cross-examination began. Thus one not only stumbles upon a new circumstance in favor of his opponent, but the fact that it came to light during the cross-examination instead of in the direct multiplies its importance in the eyes of a jury, for it has often been said, and it is a well-recognized fact, that accidental testimony always makes a greater impression on a juror's mind than that deliberately and designedly given.

In the search for the probable it is often wise to use questions that serve for little more than a suggestion of the desired point. Sir James Scarlett used to allow

the jurors and even the judges to discover for themselves the best parts of his case. It flattered their vanity. Scarlett went upon the theory, he tells us in the fragments of his autobiography which were completed before his death, that whatever strikes the mind of a juror as the result of his own observation and discovery makes always the strongest impression upon him, and the juror holds on to his own discovery with the greatest tenacity and often, possibly, to the exclusion of every other fact in the case.

Another danger in this hazardous method of cross-examination in searching for probabilities is the development of such a mass of material that the minds of the jurors become choked and unable to follow intelligently. If one cannot make his points stand out clearly during his cross-examination, he had better keep his seat.

At the end of a long but unsuccessful cross-examination of a plaintiff, the kind we have been discussing, an inexperienced trial lawyer once remarked rather testily, "Well, Mr. Whittemore, you have contrived to manage your case pretty well." "Thank you, counsellor," replied the witness, with a twinkle in his eye; "perhaps I might return the compliment if I were not testifying under oath."

ART IN HANDLING DISCREDITING DOCUMENTS

CHAPTER XII

ART IN HANDLING DISCREDITING DOCUMENTS

One of the most important things in cross-examination is a thorough knowledge of the art of properly handling written documents to be used against a witness so as to discredit or even destroy him.

One often sees the most damaging documentary evidence, as for example in the form of letters or affidavits, fall absolutely flat as revealers of falsehood, merely because of the unskilful way in which they are handled. If the advocate has in his possession a letter written by the witness, in which he has taken a position on some part of the case opposite to the one he has just sworn to, he should avoid the common error of showing the witness the letter for identification, and then reading it to him with the inquiry, "What have you to say to that?" During the reading of his letter the witness will be collecting his thoughts and getting ready his plausible explanations in anticipation of the question that is to follow, and the effect of the damaging letter will be lost.

The correct method of using such a letter is to lead the witness quietly into repeating the statements he has made in his direct testimony, and which his letter contradicts. "I have you down as saying so and so. Is that correct? Or will you please repeat what you did say? I am apt to read my notes to the jury and I want to be accurate." The witness will repeat his statement. Then write it down and read it off to him. "Is that correct? Is there any doubt about it? For if you have any explanation or qualification to make, I think you owe it to us, in justice, to make it now before I leave the subject." The witness has none. He has stated the fact; there is nothing to qualify; the jury rather like his straightforwardness. Then let the whole manner toward him suddenly change, and spring the letter upon him. "Do you recognize your own handwriting, sir? Let me read you from your own letter, in which you say—" and afterward, "Now what have you to say to that?" Thus the point will be made in such fashion that the jury will not readily forget it.

It is usually expedient, when a point has once been made, to drop it and go to something else, lest the witness wriggle out of it. But when an advocate has a witness under oath, contradicting a statement he has

previously made, when not under oath, but in his own handwriting, he then has him fast on the hook, and there is no danger of his getting away; now is the time to press the advantage. His self-contradiction should be put to him in as many forms as can be invented.

"Which statement is true?" "Had you forgotten this letter when you gave your testimony to-day?" "Did you tell your counsel about it?" "Were you intending to deceive him?" "What was your object in trying to mislead the jury?"

"Some men," said a London barrister who often saw Sir Charles Russell in action, "get in a bit of the nail, and there they leave it hanging loosely about until the judge or some one else pulls it out. But when Russell got in a bit of the nail, he never stopped until he drove it home. No man ever pulled *that* nail out again."

It not infrequently happens that the plaintiff and defendant are themselves the only witnesses to some oral agreement which becomes the subject of their litigation. Such cases often afford the most striking opportunities for cross-examination where the advocate has letters written by the party examined.

In a case of this kind that I conducted recently the plaintiff swore that the defendant, my client, owed him over a quarter of a million dollars as the result of

an oral agreement made between them in the presence of only one witness, who was *dead* at the time of the trial.

The first two hours of my cross-examination of the plaintiff were devoted to the effort to throw him off his guard. I exhibited to him, by my questions, an apparent want of appreciation of the case and of the surrounding circumstances, allowed him to score on me over and over again, until he was in the best of humor and evidently feeling very confident of himself, at least so far as any fear of me was concerned, but all the time he was making admissions and misleading statements of fact and even absolute fabrications which I knew would eventually be his undoing.

I passed them all by as if they had made no impression upon me whatsoever, although I was in a state of intense secret exultation. Finally he became so absolutely certain of himself that I was able to encourage him to hand me out big chunks of perjured testimony which I knew would fairly engulf him later on.

I had about a dozen of the plaintiff's letters which I felt sure he had either forgotten having written or felt assured were safe in a foreign country, and which I felt equally sure he would repudiate as forgeries if he recalled their contents, or had the faintest idea that they were in my possession; and if he denied them, it would

be difficult to prove their genuineness and consequently be impossible to use them.

I was watching the clock all the time for the hour of adjournment, ever keeping the witness pleased and even smiling over the seeming weakness of my cross-examination.

Just at four o'clock, the hour for adjournment, and as he began actually to feel that quarter of a million dollars already won and in his pocket, I handed up to him a bundle of his letters, in a manner from which he might readily infer that they were of no consequence or at least as if I had not had time to read them, and asked him if he would "please identify his handwriting before the court adjourned." He started to read the first one. Had he done so all would have been over, but I checked him by reminding him that it was four o'clock, and requested him to please not delay the adjournment by reading the letters, as all I wanted to know was if they were in his handwriting. In a moment or two he had identified them all and the court adjourned.

The following day I cross-examined him throughout the entire day about these letters. They contradicted in a hundred different ways the assertions he had made so glibly the afternoon before, and at the end of the

court session his lawyers actually withdrew from the case and a verdict was directed against him by the court, although neither side had called any witnesses other than the plaintiff himself.

It was one of those rare cases where the cross-examiner has the written proofs of a witness's perfidy, which become such deadly weapons in the hands of any experienced advocate.

Sometimes it is advisable to deal the witness a stinging blow with the first few questions; this, of course, assumes that the examiner has the material with which to do it. The advantage of putting the best point forward at the very start is twofold. First, the jury has been listening to his direct testimony and have been forming their own impressions of him, and when the advocate rises to cross-examine, they are keen for his first questions. If he "lands one" in the first bout, it makes far more impression on the jury than if it came later on when their attention has begun to lag, and when it might only appear as a chance shot.

The second, and perhaps more important, effect of scoring on the witness with the first group of questions is that it makes him afraid of the examiner and less hostile in his subsequent answers, not knowing when he will trip him again and give him another fall. This

will often enable him to obtain from him truthful answers on subjects about which he is not prepared to contradict him. I have seen the most determined witness completely lose his presence of mind after two or three well-directed blows given at the very start of his cross-examination, and become almost as docile in the examiner's hands as if he were his own witness. This is the time for him to lead the witness back to his original story and give him the opportunity to tone it down or retint it, as it were; possibly even to the extent of switching him over until he finds himself supporting his side of the controversy.

This taming of a hostile witness, and forcing him to tell the truth against his will, is one of the triumphs of the cross-examiner's art. In a speech to the jury, Choate once said of such a witness, "I brand him a vagabond and a villain; they brought him to curse, and, behold, he hath blessed us altogether."

No matter what amount of experience one may have as a cross-examiner, it seems sometimes as if no amount of precaution could prevent the most stupid blunders which elicit testimony of a very damaging character.

I have found, by experience, that this catastrophe is most likely to happen when, in a moment of excitement, I temporarily abandon my own line of examina-

tion of a witness and yield to the sudden suggestion of my client, or more frequently of my junior, who whispers in my ear, "Ask him so and so." I do it, and almost invariably receive a body blow in return. Such experiences have gradually led me to the conclusion that no two minds can conduct a successful cross-examination. I now usually turn a deaf ear to all suggestions from my assistants, however clever they may seem at the time.

Mr. Sergeant Ballantine, in his "Experiences," quotes an instance in the trial of a prisoner on the charge of homicide, where a once famous English barrister had been induced by the urgency of an attorney, although against his own judgment, to ask a question on cross-examination, the answer to which convicted his client. Upon receiving the answer, he turned to the attorney who had advised him to ask it, and said, emphasizing every word, "Go home; cut your throat; and when you meet your client in hell, beg his pardon."

A good advocate should be a good actor. The most cautious cross-examiner will often elicit a damaging answer. Now is the time for the greatest self-control. If he shows by his face how the answer hurt, he may lose his case by that one point alone. How

often one sees the cross-examiner fairly staggered by such an answer. He pauses, perhaps blushes, and after he has allowed the answer to have its full effect, finally regains his self-possession, but seldom his control of the witness. With the really experienced advocate, however, such answers, instead of appearing to surprise or disconcert him, will seem to come as a matter of course, and will fall perfectly flat. He will proceed with the next question as if nothing had happened, or even perhaps give the witness an incredulous smile, as if to say, "Who do you suppose would believe that for a minute?"

In all cross-examinations an advocate should never lose control of the witness. He should confine his answers to the exact questions he asks. The witness will try to dodge direct answers, or if forced to answer directly, will attempt to add a qualification or an explanation which will rob his answer of the benefit it might otherwise be. And lastly, most important of all, an examiner must be ever on the alert for a good place to stop. Nothing can be more important than to close an examination with a triumph. Many lawyers succeed in catching a witness in a serious contradiction; but, not satisfied with this, go on asking questions, and taper off their examination until the

effect upon the jury of their former advantage is lost altogether. "Stop with a victory" is one of the maxims of cross-examination.

If an advocate has done nothing more than to expose an attempt to deceive on the part of the witness, he has gone a long way toward discrediting him with the jury. Jurymen are apt to regard a witness as a whole — either they believe him or they don't. If they distrust him on any point, they are likely to disregard his testimony altogether, though much of it may have been true. Hence, by stopping with a victory, the fact that will remain uppermost in their minds is that the witness attempted to deceive them, or that he left the witness-stand with a lie on his lips, or that he had been led to display his ignorance to such an extent that the entire audience had laughed at him. Thereafter his evidence, so far as they are concerned, is dismissed from the case.

THE "SUMMING UP"

CHAPTER XIII

THE "SUMMING UP"

In the ordinary case such as is likely to occur during the first ten years of an advocate's practice, if he has done his work properly up to the time for his closing argument, it ought not to be necessary for him to spend much, if any, time in his "summing up."

In other words, if his case has been thoroughly prepared, his jury carefully chosen, his facts clearly set forth in his "opening," his own witnesses skilfully examined so that their testimony is plainly understood by the jury, and his adversary's witnesses have been subjected to the tests of cross-examination — there should be little need of a summing up in the ordinary simple case.

Of course, the more complicated the facts the more important the summing up becomes.

In the closing argument one should always bear in mind that the jury has heard the evidence in court for the first time, and in a comparative hurry, whereas counsel may have studied the facts for weeks or months

before the trial. The jury, therefore, cannot so fully measure the value of the testimony nor so well understand its force and effect. In many cases they need these things pointed out to them, and need to be shown the connection between the multifarious little bits of testimony that go to establish the main issues which they are to decide.

It requires but little experience in court to arrive at the conclusion that the great majority of cases are composed of a few principal facts surrounded by a host of minor ones; and that the strength of either side of a case depends not so much upon the direct testimony relating to these principal facts alone, but, as one writer very tersely puts it, "upon the support given them by the probabilities created by establishing and developing the relation of the minor facts in the case."

It is the business of the advocate in his summing up to gather these multifarious minor facts and to so arrange them that their character and effect and relation to one another and to the principal facts in the case may be appreciated by the jury without any great mental effort upon their part.

In almost every trial there are circumstances which, to a jury, may appear light, valueless, even disconnected, but which, if skilfully handled by the advocate

in his summing up, become united together and thus form wedges which drive conviction into the jurors' minds.

An important principle to be borne in mind is that a closing argument filled with mere naked assertions is always feeble. It is not enough merely to state the evidence of the witnesses, however clear and concise the recital may be. But as already indicated, the connection between the facts must be shown, their relation to one another, their value must be exhibited, their probability or improbability pointed out, their truth established or their falsity exposed. The testimony should be carefully and skilfully analyzed, and the strength of the advocate's own evidence and of his own strong points made prominent, and clearly contrasted with the weakness of his adversaries' evidence and position. The conduct of witnesses, both in and out of court, including their relations to the case, their motives, their bias, and credibility should be discussed and their contradictions pointed out or explained away; everything that militates against his side should be carefully scrutinized and, where possible, should be criticised with the utmost severity. Improper motives and suspicious circumstances are proper subjects for comment and sometimes for invective, and, finally, all arguments

and inferences against his side of the case should be met and clearly refuted.

This skilful marshalling of facts and circumstances, casting weak points into shadow and bringing out strong ones into bold relief, — clearly explaining events and circumstances, giving tone and color to testimony, —is one of the crowning arts of the advocate. But he should remember that, as some one has said, with the shading and coloring materials the advocate needs always to do as a great painter advised a poor one to do with his colors, mix them "with brains."

Outside of the legal profession the prevailing idea of a great advocate seems to be that he must be a great orator, — that most rare and magnificent creation of the Almighty.

In the days of Erskine, Burke, Rufus Choate, and Webster this was more or less true, and in those days such characters were fairly idolized in the communities in which they tried their cases.

When Patrick Henry "summed up" the celebrated tobacco case against the parsons in 1758, it is said that the people might have been seen in every part of the court-house, on the benches, in the aisles, and in the windows, hushed in deathlike stillness, and bending eagerly forward to catch the magic tones of the

speaker. The jury were so carried away by his eloquence as to entirely lose sight of the express legislative enactments which clearly gave the plaintiffs the right to a verdict, and even the court lost the equipoise of its judgment, and refused a new trial; while the people (who could scarcely keep their hands off their champion after he had closed his harangue) no sooner saw that he was victorious than they seized him at the bar, and in spite of his own efforts, and the continued cry of "Order!" from sheriff and the court, bore him on their shoulders out of the court-house, and carried him about the yard in frenzied triumph.[1]

The accounts given of the effects wrought by some of Daniel Webster's speeches seem almost incredible to those who have never listened to him.

Professor Ticknor, speaking in one of his letters of the intense excitement with which he listened to Webster's Plymouth address, says: "Three or four times I thought my temples would burst with the gush of blood; for after all you must know that I am aware it is no connected and compact whole, but a collection of wonderful fragments of burning eloquence, to which his manner gave tenfold force. When I came out, I was almost afraid to come near to him. It seemed to

[1] Donovan's "Modern Jury Trials."

me that he was like the mount that might not be touched, and that burned with fire."

And where was "the force of fighting eloquence better illustrated than when General Butler was heard in his powerful philippic on an Indianapolis editor, when hundreds stood up on their seats and shouted: 'Hit him again! Give it to him!' striking their hands together and reiterating, 'Give it to him! give it to him!' "[1]

But nowadays the public press, (and thereby the general diffusion of information), the better education of the middle classes, the gradual development and growing intelligence of mankind has materially weakened the force of oratory, — formerly the one most effective weapon of the advocate.

It is now evidence rather than eloquence that prevails with our modern juries, and this is becoming more so every day, and the old-fashioned formal harangues, "flashings of intuition," have gradually given way to the brief businesslike speeches of modern times.

It would hardly be germane to our subject to discuss the changes in society and the manifold causes that have led up to this state of affairs; but certain it is that nowadays we seldom, if ever, witness the dramatic scenes that a century ago used to charac-

[1] Donovan's "Modern Jury Trials."

terize jury trials. Whereas in the days of Henry and Webster, when speaking on questions, the decision of which involved the most momentous consequences to his country, the orator could not have been expected to speak temperately, for his words came red-hot from his heart.

In these days, however, the great majority of questions that come up for decision turn on masses of contradictory testimony on matters relating to our every-day business or social life, and the vehemence of a Burke or a Demosthenes would be very much out of place. In its stead we now have displayed by our leading advocates a happy facility of dealing with tangled or complicated facts, combined with keen ingenuity and skill, sound judgment, and a power of clear, logical, luminous statement.

The up-to-date advocate who can thus present his case on the facts with precision and clearness is bound to win in the long run.

I shall never forget a story told me by the late Recorder Smyth which I think has enabled me to win many a difficult case. William A. Beach had made one of his impassioned speeches in behalf of a prisoner whom he was defending in the Recorder's court. He retired to the corridor of the court-house for some

fresh air, and was peering in through the court-room door, when an enthusiastic admirer came up to him and congratulated him on his eloquent address to the jury, which could not fail to acquit the prisoner. "My friend," said Beach, "you fail to observe that the District Attorney, who is now replying to me, is reading the *stenographer's minutes of the testimony* to the jury; after that there *can* be no acquittal."

Hence the "sound and fury" of the ancient orator is now seldom heard in our country, and except on rare occasions, the modern advocate "deals in facts rather than in fancies, in figures of arithmetic rather than in figures of speech."

In this connection attention is called to the danger of using too flowery language in "summing up." I cannot better emphasize this point than in the language of Dr. Hall, who once wrote: —

"If I were upon trial for my life, and my advocate should amuse the jury with tropes and figures, burying his argument beneath a profusion of metaphors, I would say to him: 'Tut, man; you care more for your vanity than for my hanging. Put yourself in my place; speak in view of the gallows and you will tell your story plainly and earnestly.' I have no objections to a lady's binding a sword with ribbons and studding it with roses

when she presents it to her lover, but in the day of battle he will tear away the ornaments and present the naked edge to the enemy."

Another good illustration of the danger of using too florid speech is afforded by the story of an English barrister who, having made the mistake of using too flowery language in addressing a hard-headed English judge (when such speech was in bad taste and wide of the issues before the court), was impatiently rebuked by his Lordship, who remarked, "I advise you, sir, to pluck a few feathers from the wings of your imagination and stick them in the tail of your judgment."

Of course, it is the ambition of all advocates to speak well. They recognize with Cicero that it is "most glorious to excel men in that in which men excel all other animals." Eloquence, it is true, like a genius for music or invention or painting, is primarily a gift born with a person, but like all other divine inheritances it is a gift which needs to be assiduously cultivated and developed. It is, therefore, a matter of regret that so little attention is paid in our colleges and law schools to this branch of education. For, surprising as it may seem, the one thing most neglected in our law schools is the art of speaking in a tone and manner attractive to and easily understood by a court or jury.

Lord Chesterfield went so far in his letters to his son, as to tell him that every man of fair abilities might be an orator. The vulgar, he said, look upon a fine speaker as a supernatural being and endowed with some peculiar gift of heaven. He himself maintained that a good speaker is as much a mechanic as a good shoemaker, and that the two trades were equally to be learned by the same amount of application. But by the term "orator" Chesterfield evidently meant a pleasing and persuasive speaker.

Henry Ward Beecher, in writing on the study of oratory, says:—

"Now in regard to the training of the orator, it should be a part and parcel of the school. The first work is to teach a man's body to serve his soul. Grace, posture, force of manner, the training of the eye that it may look at men, and pierce them, and smile upon them, and bring summer to them, and call down storms and winter upon them; the development of the hand that it may wield the sceptre or beckon with sweet persuasion; these themes belong to men. And, among other things, the voice — perhaps the most important of all and the least cultured. What multitudes of men there are who wear themselves out because they put their voice on a hard run at the top of its compass, and

there is no relief to them, and none unfortunately to the audience. But the voice is like an orchestra. It ranges high up and can shriek betimes like the scream of an eagle; or it is low as the lion's tone; and at every intermediate point is some peculiar quality. It has in it the mother's whisper and the father's command. It has in it warning and alarm. It has in it sweetness. It is full of mirth and full of gayety. It glitters, though it is not seen with all its sparkling fancies. It ranges high, intermediate, or low, in obedience to the will, unconscious to him who uses it; and men listen through the long hour, wondering that it is so short, and quite unaware that they have been bewitched out of their weariness by the charm of a voice, not artificial, but by assiduous training made to be his second nature. Such a voice answers the soul and is its beating."

In this connection it is interesting to note that Beecher himself placed himself, when at college, under a skilful teacher and for three years was drilled incessantly, he says, in posturing, gesture and voice culture, and continued the same studies afterwards at the theological seminary.

Largely because of the lack of such a training there are a large number of dull, uninteresting speakers that we hear in our courts every day, wearying their juries

with their pointless, endless speeches, delivered in monotonous, meaningless, sleep-producing tones, accompanied by the most inappropriate gestures, and burying their evidence under an avalanche of words and ambiguities. How little they have learned of "the divine art which harmonizes language till it becomes a music, and shapes thought into a talisman!"

Indeed, many lawyers try to be eloquent without knowledge, regarding speech as "something given to man to disguise his thoughts." They indulge in what are not inappropriately called "mouthfuls of wind," and appear, when speechmaking, to have followed Rousseau's receipt for a love-letter, — "to begin without knowing what you are going to say, and to leave off without knowing what you have said."

On the other hand, with the proper training and practice one may acquire the great art of so putting things in his "summing up" as to both please and interest, while his real object is to persuade and convince.

Xenophon said hundreds of years ago, "It is easiest to convince those whom we please."

Two men may explain the same fact or give an account of some occurrence or even tell some story; the one produces conviction while the other would hardly arouse attention, although the matter conveyed by both may

be substantially the same. Every one observes this in his contact with men in any walk of life. It is especially true, however, in the prosy atmosphere of our courts.

At the same time flippancy above all things — or carelessness of manner — must be avoided. Our juries expect that trials which call them from their business shall be treated seriously and earnestly by the lawyers asking their attention.

"If the case is to an advocate the one thing, the great thing, the real thing," he will try it in a businesslike way and there will be unconsciously evidenced by him a straightforward, natural, and determined effort to win, which is most effective with a jury.

It has been said that if a lawyer in his summing up can make it appear that it is the cause itself which deserves the favor of the jury, he does all that the most consummate master of the art can do, as juries do not like to feel that it is the art of the advocate, and not the right of the cause, to which they are expected to yield.

Professor Matthews relates an anecdote of Rufus Choate which may serve as an illustration of the point to which I am now directing attention. "We were once," writes the professor, "talking about the ability of Rufus Choate with an intelligent old gentle-

man in Massachusetts, a hard-headed bank president, who had served as foreman of a jury in a law case. "Mr. Choate," said he, "was one of the counsel in the case, and, knowing his skill in making white appear black and black appear white, I made up my mind at the outset that he should not fool me. He tried all his arts, but it was of no use. I just decided *according to the law and the evidence.*"

"Of course you gave your verdict against Mr. Choate's client?"

"Why, no, we gave a verdict *for* his client; but then we couldn't help it; he had the law and the evidence on his side!"

For the encouragement of young advocates it is interesting to note the fact, in this connection, that many of the most successful trial lawyers in the history of both England and America have been in no sense eloquent speakers.

They were lawyers whose words never "dropped manna" and who never "spoke roses."

Sir James Scarlett — whom I have already referred to as easily the first advocate of his time — was one of these.

His style is said to have been colloquial, and his effort was to talk the jury over to his side. He never

bullied them like his antagonist, Brougham, who attempted to wring his verdicts from juries by his oratory and to force them reluctantly to do his bidding. Scarlett's bearing towards his jury was bland and respectful. He took care never to alarm them with the fury of rhetoric. He was fluent and, as Johnson once said, "he was a tree that only bore crabs; but he bore a great many crabs."

A story is told about Scarlett by Justice Wightman, who was leaving his court one day and found himself walking in a crowd alongside a countryman, whom he had seen, day by day, serving as a juryman, and to whom he could not help speaking. Liking the looks of the man, and finding that this was the first occasion on which he had been at the court, Judge Wightman asked him what he thought of the leading counsel. "Well," said the countryman, "that lawyer Brougham, he be a wonderful man, he can talk, he can, but I don't think nowt of Lawyer Scarlett." "Indeed!" exclaimed the judge, "you surprise me, for you have given him all the verdicts." "Oh, there's nowt in that," was the reply; "he be so lucky, you see, he be always on the right side."

Sir Albert Pell was another instance of a very successful advocate, but who became famous for violating the rules of grammar and pronunciation every time he

opened his mouth. He was very verbose and prolix and yet succeeded in getting verdicts. A gentleman happened to be in a room with him the day after he had been engaged in an important case in the neighborhood and made some slight allusion to the tautologous speech which he had just heard the counsel deliver. Pell immediately acknowledged the justice of the criticism. "I certainly was confoundedly long," he said, "but did you observe the foreman, a heavy-looking fellow in a yellow waistcoat? No more than one idea could ever stay in his thick head at a time, and I resolved that mine should be that one, and so I hammered on until I saw by his eyes that he had got it. Do you think I care a damn for what you young critics might say?"

Lord Brougham used to say of Pell's style of speaking that "it was not eloquence; it was Pell-eloquence and deserved to have a chapter in the books of rhetoric all for itself."

Brown, describing another great verdict-getter, says: "In addressing a jury he seemed rather to argue his case with them than to them, and in the language of one of his competitors, he virtually got into the jury-box and took part as it were in the decision of his own case."

Thus it is seen that jurors give their verdict to a

lawyer, not because they think he has made a great speech, but because he has convinced them that he is right.

The late Senator George F. Hoar gives the following graphic description of Rufus Choate in his closing argument to a jury: —

"It was a curious sight to see on a jury twelve hard-headed and intelligent countrymen, — farmers, town officers, trustees, men chosen by their neighbors to transact their important affairs, — after an argument by some clear-headed lawyer for the defence about some apparently not very doubtful transaction, who had brought them all to his way of thinking, and had warned them against the wiles of the charmer, when Choate rose to reply for the plaintiff — to see their look of confidence and disdain — the averted eye — and then the change; first, the changed posture of the body; the slight opening the mouth; then the look, first, of curiosity, and then of doubt, then of respect; the surrender of the eye to the eye of the great advocate; then the spell! the charm! the great enchantment! — till at last, jury and audience were all swept away, and followed the conqueror captive in his triumphal march."

The earliest English lawyers were not remarkable for their eloquence. Ascham speaks of some of them

as "roaring like a bull," and he adds, "they do best when they cry loudest." And it is said that probably then the most successful advocate never aspired to do more than to obtain the approbation of the court and his brethren at the Bar, for there was then no public watching with intense interest the proceedings of the courts of law and justice, ready to reward the avenger of the wronged or the protector of the innocent. There was no press to advertise.

There is very little known even of Coke as an advocate, — Coke, the great luminary of English jurisprudence, once Speaker of the House of Commons, then Attorney-General, and finally raised to the bench. The reports of the state prosecutions of Coke's time represent him in no favorable light, but rather as rough, blustering, and overbearing, extremely disrespectful to the court and absolutely insulting to the prisoners. His conduct towards Raleigh in his trial is well known. In his examination he always addressed him as, "thou art a monster; thou hast an English face but a Spanish heart," and similar epithets.

This is something like the kind of oratory indulged in by some of our Congressmen in Washington, who, in their public speeches, brand the Press as "bloodhounds" and denounce everything and everybody opposed to

them, in such exaggerated expressions that they only serve to make the speaker the laughing stock of his country, which pays but little heed to anything he may say thereafter.

Contrast this style of "spread-eagleism" with the oratory of England's greatest advocate, John Erskine, whose lips were touched by the divine fire, and whose simple grace of diction and natural passion carried everything before him, whose words were like "arrows winged with the feathers of the very bird of paradise"; or with that of Rufus Choate, whose delivery has been described as "a musical flow of rhythm and cadence, more like a long, rising, and swelling song, than a talk or an argument," and whose style was described by Webster as "reason, impelled by passion, sustained by legal learning, and adorned by fancy."

In the discussion of the "opening" speech to the jury I spoke of the importance of brevity, and it is equally important for an advocate to be as brief as possible in his closing argument. Aaron Burr and Abraham Lincoln were both advocates of the greatest brevity in addressing juries, and knew when and how to stop, before the effect of their arguments was lost. They usually ended up with a climax which would be telling and convincing. Burr seldom spoke over half an hour and Lincoln's best

efforts are said not to have occupied more than twenty minutes. Patrick Henry usually employed the same terse style, and believed doubtless in the old adage, "Few men have ever repented of silence."

But Rufus Choate's idea of the proper length of an address to a jury was that "a speaker makes his impression, if he makes it, in the first *hour*, sometimes in the first fifteen minutes; for if he has a proper and firm grasp of his case, he then puts forth the outline of his grounds of argument. He plays the overture, which hints at or announces all the airs of the coming opera. All the rest is mere filling up; answering objections, giving one juryman little arguments with which to answer the objections of his fellows, etc. Indeed, this may be taken as a fixed rule, that the popular mind can never be vigorously addressed, deeply moved, and stirred and fixed for more than one hour in any single address."

I respectfully commend that sentiment to some of the wordy orators of the present day, and remind them that those are the words of Rufus Choate, America's greatest forensic advocate, Choate "the Ruler of the Twelve," "the Wizard of the Court Room."

Lord Ellenborough once rebuked an English barrister who had been arguing a case before him during the entire morning session of the court. After the lunch

recess and upon the re-assembling of the court, the loquacious orator asked the judge if he "might have the pleasure of resuming his argument." His Lordship replied quietly: "You may continue your argument, Mr. Blank, but the *pleasure* was gone some hours ago."

One of the shortest addresses to a jury that has been called to my attention was in a case where an editor of a newspaper brought an action against three gentlemen who had been attacked in his paper and who, in consequence, had horsewhipped the editor. Counsel for the plaintiff made a splendid speech depicting with great eloquence the cruelty with which his client had been treated and plainly carried the jury along with him. When it came the defendants' lawyer's time to address the jury, he attempted to obliterate the impression made by this brilliant speech in these few words spoken in a familiar tone: —

"My friend's eloquent complaint in plain English amounts to this, that his client has received a good horsewhipping; and mine is equally as short — *that he richly deserved it.*" [1]

Cicero sums up the whole art of speaking in four words, "*apte, distincte, ornati disere*" — to speak to the

[1] Donovan's "Modern Jury Trials."

purpose, to speak clearly and distinctly, to speak gracefully.

If, therefore, an advocate takes as his watchwords, brevity, clearness, simplicity, and close adherence to the salient points of his case, together with fairness and honesty of statement, and makes his appeal to the intellect and common sense of his jurors, rather than to their feelings, he will seldom fail to do his duty by his client.

On the other hand there will always be occasions when an appeal to the feelings may become both proper and even necessary, — cases which will demand stirring, eloquent speeches and call for all the force and graces of oratory. For the love of oratory is still strong in the human heart; like a delicious odor, its charm is subtle, and baffles all our efforts to explain it, and whenever there is sufficient occasion for it, the jury expect and are entitled to the best efforts of the advocate's oratorical abilities. An advocate who cannot then "put fire into his speeches should put his speeches into the fire."

There is hardly any man so illiterate or poorly educated, so destitute of sensibility, that he is not charmed by the music of eloquent speech, even though it affect his senses and feelings rather than his intellect. And

here should be borne in mind what I have said about the advantages of a pleasing manner, the quality of voice, and the necessity of being well equipped, both by education and by special training in oratory; for a happy turn, an excellent repartee, a pathetic story, or an apt illustration, eloquently told, will often win a verdict.

Practically all of the truly great orators of the world have become so by the ardent study of the orations of those geniuses who have preceded them, although much that goes to make an oration dies with its author and the event that called it into being. To really appreciate a great oration one must have heard it not only with its accompaniments, but with a sense of the temper of those to whom it was addressed. Some great orator has said that the key to a great speech is always to be found "in the assembly" — in the audience. The printed speech but poorly represents the words themselves as they fell warm from the lips, and can, at best, reproduce little more than a suggestion of the real impression made at the time of delivery. It can give little more idea of it than an "alphabet gives of a poem." Something can be accomplished by picturing to ourselves the crowded court room, the contagious magnetism of the great audience, "the fiery life of the

moment," the hush, the expectancy, the eager faces, the silence and dignity of the court, — if we wish to realize even faintly the real spirit of the occasion.

The country parson who had just electrified his parishioners by a stirring *ex tempore* discourse preached during a thunder-storm, when asked for permission to have it printed, was right when he replied, "Yes, by all means, if you will *print the thunder-storm along with it!*"

Another situation an advocate will often be called upon to meet is created when the feelings of a jury have been appealed to by his opponent, who has left them in an emotional mood, and when their sympathies have thus been thoroughly aroused before he rises to reply. It is then well for him to fall in with this mood and coincide with it until he can gradually lead the jury back to a sterner, more logical view of the evidence.

To illustrate: "At a murder trial in south Indiana an eloquent counsel had left the jury in tears — in fact, all in the court room were moved by his touching appeal, and when his opponent arose and began his reply, even his emotion was shown so distinctly in tone and manner that every one seemed to believe in the prisoner's acquittal. But the sublime moment had not come, and the prosecuting attorney was only building a bridge

on which he could carry the jury over to the other side. He knew that he must show that his own sympathies were not so far from theirs. He knew that their humane sensibilities had been aroused and he must go with them to a reasonable turning-point. From low tones of kindness and sympathy he gradually turned to questions of *duty* and the sober and calm reason of trials like the one they were engaged in hearing and about to determine. He spoke of its effect upon the community and upon their own rights as citizens. In a few moments he had taken them home and shown them the value of personal security — of the necessity for the law's protection. Then he suddenly drew a picture of the dangers if laws were violated and tears should be allowed to screen the guilt of the offenders. Finally, with touching words he regretted his duty and theirs to condemn one who had in a moment possibly of anger brought sorrow and disgrace upon others who must now bear the natural consequences, and in such a strain ended his excellent argument, winning a case for the people by tact and moderation which he could easily have lost by showing a contempt for sympathy, or by overzeal in his closing address to a jury already predisposed to acquit the prisoner." [1]

[1] Donovan's "Modern Jury Trials."

Among noteworthy examples of a "summing up," the closing argument of Mr. Anthony McReynolds in the May Stephens insurance case tried at Detroit, Michigan, in 1875, is considered by many good judges to be "a gem in English literature, sublime in sentiment, eloquent in heart thoughts, grand in its simplicity." McReynolds, at the time, was fully seventy years of age, a man of large stature and of the old school of lawyers. His accent was peculiarly Scotch, and his style of speech rugged and Western. The suit was to recover the amount of a life insurance policy issued by the Michigan Mutual Life Insurance Company. Mrs. Stephens, the plaintiff's intestate, was found drowned in a cistern, and left as her heirs two small children. The arguments of counsel for the insurance company were that the plaintiff had insured her life heavily intending to commit suicide, as she was too poor to pay the premiums, and must have known it. McReynolds' reply was, in part, as follows: —

"That mother, the object of this bereavement, is gone. Her lips are dumb; her voice is hushed — low in the silent grave. No whisper can come back to say, 'I slipped, I fell. I was misguided. I did all. I risked all for you, my children, my little ones!'

"She has gone. She has whispered the last good-

night and gone! The secrets of her death are locked up till the judgment day.

"Oh, in imagination, I can see her now; it is early twilight, it is winter, the snow is falling fast and slippery; whitening the little plank walk to the cistern. She has company. She hurries down the walk to the well, catching up a pail, leaving the hook hanging over the curbing; bending low, she slips, she falls, the water covers over her, no one hears, — she is drowned! It is an *accident*, and I almost hear her say as she looks down to you, to this upright judge, this honest jury: 'Gentlemen, you may cheat my children if you will, but spare them the burden of dishonor; the money will be a poor pittance at the most to that priceless character that my innocent children should inherit.' Why, gentlemen, they would have you think that this woman loved her little ones so much that she dared the pains of hell and drowned herself, that they might be made rich, though orphaned! No crown of glory she held in prospect; no garland of the blest to be wreathed upon her brow! Only a sordid fraud, a leap in the dark oblivion of the great hereafter, for what? — to get gain! . . ."

McReynolds closed as follows: —

"Gentlemen, my work is almost done. Poor as it is I must trust to you to do a better work. And my little

clients, God bless you! I have done my best to make your names an honor to our state. But oh! how poor and weak my words have been; and you, gentlemen, even now, by your silence and your interest in this case, methinks I hear you say, 'Stop! delay no longer! that we may rebuke this cruel company. Stop! that we may restore these orphans to their own; to that pure character that they will love to honor, a character as pure as they knew her on that last and long good night. Stop! that we may wipe away all tears from these orphaned eyes and plant the sweet rose of mother's love in their bright young lives to grow, bloom, and bless the world for their living in it. Stop! that we may right this wrong at once!!' Oh, God, put it into the hearts of this jury to see the truth, to vindicate a mother's name and a mother's love to her helpless children. Oh, God! remove the mist from this case. Reveal the truth to these jurors. Let them see their duty, and give them strength to do right, and to do it, remembering that some day when they shall be themselves called to leave, it may be, dependent children and the sacred memory of a good name — that of future juries theirs may expect the same just finding that they have found for us — a verdict and a vindication!" [1]

[1] Donovan's "Modern Jury Trials."

In conclusion I have but one more illustration of the music and pathos of oratory. It was not delivered in court, was addressed to no jury, but it appeals to the hearts of all true lovers of eloquence — irrespective of their religious opinions or faith — as perhaps few other prose writings in the English language ever do. The name of the author may have already been anticipated, Colonel Robert G. Ingersoll, the terse, the pointed, the apt, the humorous, the pathetic, the poetic orator of modern times.

This address was delivered on the occasion of the death of his brother, Eben C. Ingersoll, at Washington, D.C., May 31, 1879.

Colonel Ingersoll said: —

"Dear Friends: I am going to do that which the dead oft promised he would do for me. The loved and loving brother, husband, father, friend, died where manhood's morning almost touches noon, and while the shadows still were falling toward the west. He had not passed on life's highway the stone that marks the highest point; but being weary for a moment, he lay down by the wayside, and using his burden for a pillow fell into that dreamless sleep that kisses down his eyelids still. While yet in love with life and raptured with the world he passed to silence and pathetic dust. Yet, after all, it

may be best, just in the happiest, sunniest hour of all the voyage, while eager winds are kissing every sail, to dash against the unseen rock, and in an instant hear the billows roar above a sunken ship. For whether in mid-sea or 'mong the breakers of the farther shore a wreck at last must mark the end of each and all. And every life, no matter if its every hour is rich with love and every moment jewelled with a joy, will, at its close, become a tragedy as sad and deep and dark as can be woven of the warp and woof of mystery and death. This brave and tender man in every storm of life was oak and rock; but in the sunshine he was vine and flower. He was the friend of all heroic souls. He climbed the heights, and left all superstition far below, while on his forehead fell the golden dawning of the grander day. He loved the beautiful, and was with color, form, and music touched to tears. He sided with the weak, the poor, the wronged, and lovingly gave alms. With loyal heart and with the purest hands he faithfully discharged all public trusts. He was a worshipper of liberty, a friend of the oppressed. A thousand times I have heard him quote these words: 'For Justice all place a temple, and all season, summer.' He believed that happiness is the only good, reason the only torch, justice the only worship, humanity the only religion,

and love the only priest. He added to the sum of human joy; and were every one to whom he did some loving service to bring a blossom to his grave, he would sleep to-night beneath a wilderness of flowers. Life is a narrow vale between the cold and barren peaks of two eternities. We strive in vain to look beyond the heights. We cry aloud, and the only answer is the echo of our wailing cry. From the voiceless lips of the unreplying dead there comes no word; but in the night of death hope sees a star and listening love can hear the rustle of a wing. He who sleeps here when dying, mistaking the approach of death for the return of health, whispered with his latest breath, 'I am a' better now.' Let us believe, in spite of doubts and dogmas, of fears and tears, that these dear words are true of all the countless dead. The record of a generous life runs like a vine around the memory of our dead, and every sweet, unselfish act is now a perfumed flower. And now, to you, who have been chosen, from among the many men he loved, to do the last sad office for the dead, we give his sacred dust. Speech cannot contain our love. There was, there is, no gentler, stronger, manlier man."

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